Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

PHILLIP ALLEN,

Petitioner,

v.

TEXACO INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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112 pp

QUESTIONS PRESENTED

1. Whether, or not, the District Court, and the Court of Appeals, committed reversible error in granting a summary judgment depriving plaintiff/applicant of his day in Court by disregarding the written contract between Texaco and Danos & Curole, Inc., designating plaintiff/applicant to be an independent contractor, non-employee, of Texaco, Inc., and not under the control or supervision of Texaco, and concluding that the contract did not create a material issue of fact under the Fifth Circuit, and Louisiana State Court, precedent in *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 378 (5th Cir. 1985); *Dugas v. Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973), *writ denied*, 414 U.S. 1093, 38 L.Ed. 550, 94 S.Ct. 724 (1973); and *Kirkland v. Western Electric Co.*, 296 So.2d 350 (La. 4th Cir., 1974), *writ denied*, 302 So.2d 19 (La. S.Ct., 1974).

2. Can an alleged "borrowing employer" clandestinely select an alleged "borrowed servant" for ultra hazardous work not envisioned in the employee's employment contract with his general employer, or the general employer's contract with the alleged "borrowing employer", and thereby unjustly deprive the employee of his common law right of action for damages, and at the same time inflict on the general employer greater exposure under the applicable compensation act; or does such conduct vitiate any borrowed servant status previously created?

3. The District Court and the Court of Appeal erred in failing to apply Louisiana law to this Outer Continental Shelf Land Act matter.

PARTIES TO THE PROCEEDING

Petitioner

PHILLIP ALLEN, a person of the full age of majority and a resident of Morgan City, Louisiana. Petitioner is an individual and has no corporate affiliations.

Respondents

TEXACO, INC., defendant

DANOS & CUROLE MARINE CONTRACTORS, INC., Intervenor

THE GRAY INSURANCE COMPANY, the insurer of Danos & Curole Marine Contractors, Inc., Intervenor

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On June 5, 2001, Honorable Sarah S. Vance, United States District Judge, Eastern District of Louisiana, New Orleans Division, entered an order and reasons in which she granted the motion for summary judgment filed by defendant/respondent, Texaco, Inc., dismissing plaintiff/applicant's complaint with prejudice. (App. 4a)

On June 15, 2001, Honorable Sarah S. Vance, United States District Judge, Eastern District of Louisiana, New Orleans Division, entered judgment dismissing plaintiff/applicant's complaint with prejudice. (App. 3a)

On May 15, 2002, the United States Court of Appeals, Fifth Circuit, rendered a *per curium* opinion affirming the judgment of the District Court. (App. 1a)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on May 15, 2002. This petition for writ for certiorari is filed within the prescribed period of ninety (90) days after the May 15, 2002, Judgment.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. §§1254(1) and 2106.

STATUTORY AND REGULATORY PROVISIONS

Federal Rules of Civil Procedure, Article 56 (c) pertaining to motions for summary judgment, and 43 U.S.C. §§ 1331-1356, the Outer Continental Shelf Lands Act.

STATEMENT OF THE CASE

Phillip Allen, a forty-year old African-American male and veteran of the United States Navy, is a native of Morgan City, Louisiana. He was injured on September 9, 1998, while in the course and scope of his employment as a production operator with Danos & Curole. Allen had been employed by

Danos & Curole for approximately two years and in addition had nine years of offshore work experience with Shell Oil.

On September 9, 1998, he was earning $12.00 an hour and worked a seven days on, seven days off, "hitch".

The subject-matter accident occurred on September 9, 1998, while Allen was working on Texaco, Inc.'s oil production platform, the West Cameron 643A. The platform was located in the Gulf of Mexico, on the Outer Continental Shelf, off the Coast of Louisiana.

On September 8, 1998, Texaco began evacuating all non-essential personnel from its offshore rigs over a large area in the central Gulf of Mexico extending from the rigs southeast of Galveston, Texas, to the rigs southeast of New Iberia, Louisiana, a block approximately 200 miles east and west and 150 miles north and south. The evacuation was precipitated by the approach of a dangerous tropical storm named "Frances." All rigs in the aforedescribed area were evacuated by September 9, 1998, with the exception of West Cameron 643A. Plaintiff/applicant, Phillip Allen, without his knowledge or consent and without the knowledge and consent of his general employer, Danos & Curole, was designated by Texaco, Inc. as an essential person to remain on West Cameron 643A with a Texaco employee, James Sigur.

Texaco intended to evacuate Allen and Sigur after they evacuated all of the rigs north, south, east, and west of West Cameron 643A. Unfortunately, Texaco waited too long and was advised by their helicopter subcontractor that it was impossible to evacuate Allen and Sigur because West Cameron 643A was in the midst of the storm when Texaco finally decided to effectuate their evacuation.

Allen and Sigur were the only two employees left in the Western Gulf area to face the wrath of "Frances".

About 1:00 p.m. on September 9, 1998, a sump pump on the plus 12 deck, just above the sea surface, malfunctioned and Allen and Sigur went down to attempt to fix it. While down on the plus 12 deck, Allen was struck by a 25 foot wave and was almost washed overboard at which

time he, and Sigur, abandoned the repair effort because of the hazardous circumstances. However, at approximately 5:00 p.m. a warning horn went off on the rig indicating that everything on the rig, (lights, fuel, water, etc.), would be shut down if the sump pump was not fixed. Allen and Sigur went down a second time to the plus 12 deck and discovered that the sump pump was leaking. Allen got a 36-inch pipe wrench and was attempting to tighten the coupling on the sump pump to stop the leak when he slipped due to the heavy rain, wind, and difficulty gripping the wrench. He fell back against the pipe striking his back and head. He subsequently underwent lumbar surgery and is totally disabled.

Phillip Allen was an experienced operator before he went to work for Danos & Curole. He had done the same job with Shell during the 10 years that he had worked for Shell. When he first went to work for Danos & Curole there was not an operator job open with Texaco. For seven months he worked under Charles Phillips, a Danos & Curole operator, on another Texaco rig. Thereafter, an operator job opened at West Cameron 643A and he was able to perform all of the tasks of an operator without supervision.

Danos & Curole had entered into an agreement with Texaco, Inc. on March 23, 1987, described as "Texaco, Inc. Master Work Agreement with **Independent Contractor**." (Bold emphasis supplied). (Appendix Exhibit D, pp. _____).

The Master Work Agreement contains three obligatory clauses required of Danos & Curole by Texaco, Inc., to-wit:

1. "d. Contractor's Status. The parties acknowledge that contractor **is an independent contractor**. As such, Texaco shall have no voice in the discharge, supervision, or control of contractor's employees, representatives, or subcontractors or in fixing their number, compensation, or hours of service. Texaco shall have no right to

control the manner of contractor's performance but Texaco and its representatives shall have the right to inspect the work performed and make suggestions and comments thereon.

2. "2a. Indemnity Contractor covenants and agrees to fully indemnify, defend, and hold Texaco, its subsidiaries, and affiliated companies, their agents, employees, and persons for whom each is responsible. (Hereafter, collectively and individually, called 'Texaco') free and harmless from and against any and all actions, causes of action, claims, costs (including attorney's fees and court costs), damages, judgments, or liabilities in connection therewith that may be asserted by contractor, its agents, employees, subcontractors, and persons for whom contractor is responsible (hereafter, collectively and individually, called 'contractor'), Texaco's agents, employees, and persons for whom each is responsible, or any third party on account of death or personal injury of any person, caused by, or arising out of, or in any way incidental to, or in connection with the performance of the work hereunder, except that if Texaco shall be solely at fault, or liable, whether under a theory of negligence, strict liability, or combination thereof, in factually and proximately causing the particular death or injury, then this indemnity shall not apply. In the event that contractor and Texaco shall be concurrently at fault or liable, whether under a theory of negligence, strict liability or combination thereof, then contractor shall indemnify, defend, and hold Texaco free and harmless from and against any

and all actions, causes of action, claims, costs (including attorney's fees and Court costs) damages, judgments, or liabilities except to the extent of Texaco's comparative fault or liability, whether such fault or liability is based on a theory of negligence, strict liability, or a combination thereof.

3. "G. Safety. **Contractor** shall take all measures and precautions necessary or proper to provide safe working conditions and to prevent any accident in connection with the performance of work hereunder. **Contractor** shall have the sole responsibility for the safety of its employees and subcontractors, as well as their performance in accordance with the appropriate safety practices." (Bold emphasis supplied).

Scott Nimelstein, the Texaco manager of safety health and environment, responsible for field operations on the production side covering the Gulf Coasts of Alabama, Louisiana, and Texas, acknowledged that Texaco, in the case of a Danos & Curole worker, like Phillip Allen, did not: issue payroll checks, deduct withholding taxes, Social Security, or income taxes; provide medical coverage; provide retirement benefits; provide 401k programs; or permit participation in its employee stock program, like it did for its direct employees. (Appendix Exhibit E, pp. 61-62 of Nimelstein deposition).

Mr. Tommy L. Mathews, Jr., the production supervisor for Texaco in the deep west, the area in question at the time of the accident, testified that Phillip Allen was initially listed on the evacuation manifest as a non-essential person and for some reason, unknown to him, his name was scratched off of the evacuation manifest list. (Appendix Exhibit F, pp. 36, 37, Matthews deposition). He also testified that Texaco, without

the knowledge of the employee or his general employer, could arbitrarily designate employees of a subcontractor as an essential employee and require them to man a Texaco rig in a storm. This alleged right, and authority, was not contained in the contract between Texaco and Danos & Curole. (Appendix Exhibit F, pp. 48-49, Matthews deposition). Allen and a Texaco employee were the only two people left offshore in the Western Gulf during "Frances". They were to be evacuated but the weather deterioration prevented their evacuation. (Appendix Exhibit F, pp. 54, 55, and 57, Mathews deposition).

Ronald Ratcliff, Danos & Curole's account manager, testified in deposition that he had day-by-day concern for his employees' safety and sought to avoid their exposure to hazardous conditions. (Appendix Exhibit G, p. 49, Ratcliff deposition). If it came to his attention that a Danos & Curole employee had been put in danger, the Danos & Curole employee would be removed from the job pursuant to their company policy. (Appendix Exhibit G, p. 141, Ratcliff deposition).

When bad weather threatened Texaco's platforms, Ratcliff would contact Texaco to determine whether, or not, Danos & Curole's employees had been sent in, or remained out in the Gulf. (Appendix Exhibit G, p. 17, Ratcliff deposition). He would then call the platforms directly and speak directly with his employees. (Appendix Exhibit G pp. 18, 21, Ratcliff deposition). He would even suggest that Texaco evacuate Danos & Curole's employees. (Appendix Exhibit G p. 32, Ratcliff deposition).

Texaco, Inc. did not control how Phillip Allen did his work, nor would it train him to do it. There was no agreement or understanding for Texaco, Inc. to provide a supervisor or foreman to oversee the details of Allen's work. Instead, Allen would get a list of assignments from Texaco and then go about his work with no supervision. In short, Allen, from his 10 years as an operator for Shell and his two years with Danos & Curole, knew what needed to be done and Texaco, Inc. would merely monitor the results. (Appendix Exhibit G, pp. 71-73, Ratcliff deposition).

On September 9, 1998, because of his concerns for his own safety, Phillip Allen had several conversations with Daryl Langlois, Danos & Curole's personnel coordinator at the time. (Appendix Exhibit H, pp. 20, 21, Langlois deposition). Langlois spoke with Allen directly and not with any Texaco, Inc. personnel. (Appendix Exhibit H. p. 94, Langlois deposition). When Allen told him that he had been outside on the platform working in the storm, Langlois told Allen to go inside and remain there and put on his life jacket. He recognized that working on the +10 deck in a storm was dangerous. (Appendix Exhibit H, p. 38, Langlois deposition). (Appendix Exhibit H, pp. 20, 31, Langlois deposition). He then told Allen to remain inside 643A and **to refuse any order or request by any Texaco, Inc. employee to the contrary**. (Appendix Exhibit H, p. 40, Langlois deposition). After speaking with Allen, Langlois tried repeatedly to contact Texaco, Inc. and have Allen evacuated to safety. (Appendix Exhibit H, p. 21, Langlois deposition).

Employees of Danos & Curole were told to call and report if they were exposed to any danger and that's what Phillip Allen did. (Appendix Exhibit H, p. 42, Langlois deposition).

Langlois was unaware of any agreement, contract, or other understanding which anticipated that Texaco, Inc. would supervise or instruct Allen in how to go about his work. (Appendix Exhibit H p. 72, Langlois deposition).

ARGUMENT

I.

WHETHER, OR NOT, THE DISTRICT COURT, AND THE COURT OF APPEALS, COMMITTED REVERSIBLE ERROR IN GRANTING A SUMMARY JUDGMENT DEPRIVING PLAINTIFF/APPLICANT OF HIS DAY IN COURT BY DISREGARDING THE WRITTEN CONTRACT BETWEEN TEXACO AND DANOS & CUROLE, INC. DESIGNATING PLAINTIFF/APPLICANT TO BE AN INDEPENDENT CONTRACTOR, NON-EMPLOYEE, OF TEXACO, INC. AND NOT UNDER THE CONTROL OR SUPERVISION OF TEXACO AND CONCLUDING THAT THE CONTRACT DID NOT CREATE A MATERIAL ISSUE OF FACT UNDER THE FIFTH CIRCUIT, AND LOUISIANA STATE COURT, PRECEDENTS IN *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 378 (5th Cir. 1985); *Dugas v. Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973), *writ denied*, 414 U.S. 1093, 38 L.Ed. 550, 94 S.Ct. 724 (1973); and *Kirkland v. Western Electric Co.*, 296 So.2d 350 (La. 4th Cir., 1974), *writ denied*, 302 So.2d 19 (La. S.Ct. 1974).

The District Court granted Texaco's FRCP Rule 56(c) motion for summary judgment on the eve of trial by jury dismissing plaintiff/applicant's suit, with prejudice. The United States Fifth Circuit Court of Appeal in a two-page *per curium* opinion, acknowledging that its precedent on the Master Work Agreement "creates an issue of material fact on the borrowed servant issue," went on to conclude that "undisputed" facts relating to the borrowed servant factors point "so strongly toward" a borrowed servant relationship that summary judgment was appropriately granted despite contract language purporting to limit Texaco's control over Allen.

FRCP Rule 56(c) states, in pertinent part:

> , , ,"the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is **no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law." (Bold emphasis added).

The Fifth Circuit's conclusion that the facts "point so strongly" does not rise to the level of "no genuine issue", literally, or factually, as required by FRCP 56(c). Pretermitting, a decision of the material facts at issue in the verified statement of facts, the Court's reference to its own precedent in *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 378 (5th Cir. 1985), and its uncited progeny, *Dugas v. Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973), *writ denied*, 414 U.S. 1093, 38 L.Ed. 550, 94 S.Ct. 724 (1973), stand for the proposition that summary judgment was improvidently rendered in this case because of the contract between Texaco and Danos & Curole designating Phillip Allen to be an independent contractor and not an employee of Texaco and not under Texaco's supervision and control.

In *Dugas v. Pelican Construction Company, Inc.*, supra, rendered by three-deceased titans of the Court, Honorable John R. Brown, John Minor Wisdom, and Robert Ainsworth, the Court concluded, at page 778:

> "While numerous factors must be considered to determine whether an individual is a borrowed servant or employee of another, essential to that relationship is **some type of agreement, written or verbal, formal, or informal, between the general employer and the temporary employer evidencing an intention to create that relationship.** There is nothing in the record to indicate that Pelican or Union either intended or desired to

establish a borrowed employee relationship between Union and the men Pelican supplied. The written contract itself negates such an intention. The pertinent clause provides that:

> 'In the performance of the work herein contemplated, CONTRACTOR [Pelican] *is an independent contractor, with the authority to control and direct the performance of the details of the work, Union being interested only in the results obtained, but the work contemplated herein shall meet the approval of Union.* CONTRACTOR *specifically agrees that all persons employed by CONTRACTOR in performing the work covered by this contract* or by CONTRACTOR'S subcontractors, are not the employees of Union for any purpose whatsoever. . .'"

If anything, the Master Agreement between Texaco and Danos & Curole herein, more emphatically emphasizes the independent contractor, non-employee, relationship between employees of Danos & Curole than in the *Dugas v. Pelican Construction, Inc.* case, supra.

The case came before the Court in *Dugas v. Pelican Construction Inc.*, supra, by appeal from a final judgment of the District Court and not from the granting of a motion for summary judgment.

In *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985), cited by the Fifth Circuit and authored by the late Honorable Frank Tate, the Court reversed a District

Court granting of summary judgment. The Court, at page 376, recognized, as did the *Dugas* court, supra, the acquiescence of the employee as a significant factor in determining whether, or not, a borrowed servant relationship was in existence. The Court, at page 377, also like the *Dugas* Court, recognized the special weight to be given to the contractual agreement between the payroll employer and the borrowing employer expressly negating a borrowed servant relationship.

The Court in *Alday v. Patterson Truck Line, Inc.*, supra, had under consideration a contract not as definitive as to elimination of independent contractor status, as the contract involved herein. The Court in reversing the Lower Court summary judgment, at page 378, made the following pertinent observation:

> "On full development of the evidence, it is true, a trier of fact might find that, in actual working operations, the parties ignored their solemn contract. On the basis at least of the sparse factual showing here, however, we are unable to say that no factual issue is raised by these contractual provisions, which 'negate' any intention on the part of the employers to establish a borrowed employee relationship. *Dugas*, supra, 581 F.2d at 778 (where a similar agreement was held to negate a borrowing employee relationship, under the facts there present). These contractual provisions nevertheless raise an issue of fact as to Alday's status as an alleged borrowed employee of Patterson that precludes summary judgment, despite the inferences to the contrary that may be drawn from the unopposed affidavit of Atchafalaya's president and the observations of Alday himself as to his working conditions on his single day at work."

Justice Tate went on to point out the paradox of not holding the contracting parties to their agreement. At page 378, he pointed out the well-reasoned impetus for the Court's

holding, as follows:

> "This may perhaps be more readily seen if a converse situation is posed. If a third party was injured by Alday's tort on Patterson's premises, and sought to hold Patterson liable under *respondeat superior* as Alday's borrowing employer such third party plaintiff could not secure a summary judgment holding Patterson liable simply because of a self-serving and conclusory affidavit by Atchafalaya that, contrary to the formal contract between Atchafalaya and Patterson, Atchafalaya had relinquished control of Alday to Patterson. . ."

Likewise, had Phillip Allen negligently injured a third party and that third party was suing Texaco for damages under *respondeat superior*, is there any question but that Texaco would be hiding behind the contract and seeking summary judgment.

Failing to give effect to the contract as was done by the Courts in *Alday v. Patterson*, supra, and *Dugas v. Pelican*, supra, allows Texaco to take a "heads I win, tails you lose" position toward subcontractor employees and third persons.

The Fifth Circuit in *Brown v. Union Oil Co.*, 984 F.2d 674 (5th Cir. 1993) recognized that borrowed servant status may be a "matter of law" or a "matter of fact". The Court, at page 677, opined:

> "The issue of borrowed employee status is a 'matter of law' for the District Court to determine, *Melancon*, 834 F.2d at 1244, but some cases involve factual disputes on the issue of borrowed employee status and require findings by a fact-finder. See Id. at 1245n13; *West v. Kerr-McGee Corp.*, 765 F.2d 526-531, (5th Cir. 1985); *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 378 (5th Cir. 1985). In

> *Melancon*, *West*, and *Alday*, **factual findings were necessary** concerning the third borrowed employee factor – – whether the original employer and borrowing employer had an understanding or agreement on the issue of employee status . . ." (Bold emphasis added).

Even in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), the cornerstone case on borrowed servant status, the Court, at page 313, stressed the significance of an agreement:

> "Although a formal agreement between the two employees is not considered indispensable to the borrowed servant relationship, the very terms 'borrowed' and 'loaned' connote some type of agreement, understanding, or meeting of the minds between the borrower and the lender. . ."

The Master Agreement negates Danos & Curole's relinquishment of "control", the essential factor in a determination of borrowed servant status and, likewise, negates Texaco's "control". Since "control" is the seminal factor in *Ruiz v. Shell Oil*, supra, and "control" has been contractually eliminated by Texaco and Danos & Curole how can one conclude that there is not a material issue of fact at issue for determination by a Jury under the aforecited jurisprudence and contract.

Therefore, it is respectfully submitted that the contract between Texaco and Danos & Curole is binding between themselves, and Phillip Allen under that contract is an independent contractor and not a borrowed servant. Accordingly, the criteria of *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), for determination of borrowed servant status does not enter into consideration unless there is a third party claim.

II.

CAN AN ALLEGED "BORROWING EMPLOYER" CLANDESTINELY SELECT AN ALLEGED "BORROWED SERVANT" FOR ULTRA HAZARDOUS WORK NOT ENVISIONED IN THE EMPLOYEE'S EMPLOYMENT CONTRACT WITH HIS GENERAL EMPLOYER, OR THE GENERAL EMPLOYER'S CONTRACT WITH THE ALLEGED "BORROWING EMPLOYER", AND THEREBY UNJUSTLY DEPRIVE THE EMPLOYEE OF HIS COMMON LAW RIGHT OF ACTION FOR DAMAGES, AND AT THE SAME TIME INFLICT ON THE GENERAL EMPLOYER GREATER EXPOSURE UNDER THE APPLICABLE COMPENSATION ACT OR DOES SUCH CONDUCT VITIATE ANY BORROWED SERVANT STATUS PREVIOUSLY CREATED?

The Master Work Agreement between Texaco and Danos & Curole provides:

> ". . . CONTRACTOR (Danos & Curole) shall have the sole responsibility for the safety of its employees and subcontractors, as well as their performance in accordance with the appropriate safety practices . . ." (Appendix Exhibit D, pp. ____).

Nothing in the agreement authorizes Texaco to subject Danos & Curole employees to an ultra hazardous work environment. As a matter of fact the only clause in the agreement dealing with working conditions is that hereinabove placing the responsibility squarely on the shoulders of Danos & Curole. How then can Texaco not be required to notify Danos & Curole that the status of its employee has been changed to "essential", and one of two in the Western Gulf arbitrarily, and clandestinely, chosen to face the hazards of a storm, "Francis", severe enough to require massive evacuation?

If a "borrowed servant" status can be created by a meeting of the minds; can it not then be violated by a breach that strikes at the very foundation of the relationship?

In the preceding argument we have stressed the necessity for an agreement between the general employer and the borrowing employer and, obviously, the general employer herein cannot be held to have been in agreement with Texaco's decision. This is made abundantly clear by the deposition testimony of Daryl Langlois, Danos & Curole's personnel coordinator, who upon learning that his employee, Phillip Allen, was still on the Texaco platform in the middle of the storm, ordered Phillip Allen to stay inside and **to refuse any order or request from Texaco, or its employees to the contrary**. Mr. Langlois then repeatedly tried to contact Texaco to effectuate Allen's evacuation to safely. Is there any doubt who was in "control" at this time under *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969). Any status that existed prior to that time was terminated.

In *Dugas v. Pelican*, supra, the Court went on to point out another very significant and often overlooked requisite of a borrowed servant relationship, namely, acquiescence of the employee who, after all, has a vested interest in determining whether, or not, to accept the working conditions of the borrowing employer.

The Court, at page 778, made the following pertinent observation:

> "Other traditional factors generally indicative of the borrowed employee relationship, and absent here, are 'acquiescence by the [employee] that he be employed' by the [temporary employer]' . . ."

More importantly, there was never any acquiescence by plaintiff/applicant to the danger to which Texaco exposed him, without his "consent" and without the "consent" of his employer.

The Court in *Alday v. Patterson Truck Line, Inc.*, supra, at p. 375, N5, emphasized that the employee's acquiescence can only be achieved when the employee appreciates the danger associated with the work to which he is assigned.

If Texaco had told Phillip Allen that he was going to be left on one of their platforms in a dangerous storm, he would have been entitled to refuse the employment and ask his general employer to send him to a less hazardous employment. He was not given that opportunity and he cannot be made to acquiesce in a hazard of which he has no knowledge. Such a conclusion would relegate him to a kidnap-like status, rather than an employee status.

III.

THE DISTRICT COURT AND THE COURT OF APPEAL ERRED IN FAILING TO APPLY LOUISIANA LAW UNDER THE OUTER CONTINENTAL SHELF LANDS ACT.

Under the Outer Continental Lands Act, 43 U.S.C. §§1331-1356, Louisiana Law applies to the Texaco 643A offshore platform. 43 U.S.C. §1333(a)(2).

This Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), acknowledged that the laws of the adjacent state, Louisiana herein, shall apply to the extent that they are applicable and not inconsistent with applicable Federal laws.

The Louisiana law, regarding the effect of a contract between general employer and the borrowing employer stipulating employee status, is identical to that laid down by the Fifth Circuit in *Alday v. Patterson Truck Line, Inc.*, supra, and *Dugas v. Pelican Construction Company, Inc.*, supra. In *Kirkland v. Western Electric Co.*, 296 So.2d 350 (4th Cir. 1974), *writ denied*, 302 So.2d 19 (La. 1974), the Court, at page 353, stated:

> "Clearly the contract between Western Electric and Private Patrol **is the law**

> **between these parties and they are bound between themselves by their agreement** that the guard will be considered the employee of Private Patrol at all times during the performance of his duties, but by contract these parties cannot fix the status of that guard with respect to rights belonging to and obligations owed to third parties who are not in any way parties to the contract." (Bold emphasis supplied).

Interestingly enough the Louisiana Court took care of the third party paradox raised by Judge Tate in *Alday v. Patterson Truck Lines, Inc.*, supra, by exempting third parties from the contract.

Under Louisiana law there is also a presumption that the general employer retains control and remains liable for the negligent acts of his employees. If the general employer seeks to establish that his employee has become the "borrowed employee", or an employee *pro hac vice*, of another, he must establish by a preponderance of the evidence that the employee not only has been loaned and is under the control of the borrowing employer but also that the relationship of master and servant which therefore existed between the general employer and the employee has been suspended. See *Cooley v. Slocum*, 313 So.2d 606 (La. 3rd Cir. 1975).

Texaco cannot overcome its contractual agreement as to the status of Danos & Curole employees and cannot meet the *Cooley v. Slocum*, supra, burden under the facts verified in the statement of facts herein.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant the within writ of certiorari and after due proceedings reverse the judgment of the United States District Court, Eastern District of Louisiana, New Orleans

Division, and the decision of the United States Fifth Circuit Court of Appeal granting the summary judgment of defendant/respondent, Texaco, Inc. dismissing the complaint of plaintiff/applicant, Phillip Allen, and remanding the case to the United States District Court for the Eastern District of Louisiana, New Orleans Division, for a trial on the merits.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document.)
No. 01-30727

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Allen

v.

Texaco Inc

May 15, 2002 filed

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 99-CV-1456-R)

Before REAVLEY, SMITH and DENNIS, Circuit Judges.
PER CURIAM:*

Plaintiff-Appellant Phillip Allen appeals the district court's order granting summary judgment on his suit for negligence against Texaco. We AFFIRM the decision of the district court for the reasons provided by that court.

With respect to Allen's argument that the district court erroneously placed the burden on him to negate the "borrowed servant" affirmative defense, the court does not appear to have done so. The court never stated that Allen would bear the burden of proof on the borrowed servant issue at that, and correctly stated the law relating to burden of proof issues. Rather than finding that Allen failed to put forth evidence on the borrowed servant issue, the court concluded that "the facts overwhelmingly support a finding that plaintiff was Texaco's borrowed employee." The record supports this conclusion.

Though not discussed by the parties or the district court, we also note that generally under this Court's

precedent, a contractual provision like § 1(D) of the Master Work Agreement creates an issue of material fact on the borrowed servant issue.fn1 However, the undisputed facts relating to the other borrowed servant factorsfn2 point so strongly toward a borrowed servant relationship that summary judgment was appropriate despite contract language purporting to limit Texaco's control over Allen.fn3

AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

fn1Alday v. Patterson Truck Line, Inc., 750 F,2d 375, 378 (5th Cir. 1985).

fn2Ruiz v. Shell Oil Co., 413 F.2d 310,312-13 (5th Cir. 1969) (identifying the factors that courts should typically look to in determining whether an employee is a borrowed servant).

fn3Alday, 750 E.2d at 379 (citing Gaudet v. Exxon Corp., 562 F.2d 351, 358-59 (5th Cir. 1977)). The Court also notes that the Master Work Agreement in the present case did not as strongly disavow the intent to create a borrowed servant relationship as did the contract at issue in Ai4ay, or in a similar case, West v. Kerr-McGee Corp., 765 F.2d 526, 531 (5th Cir. 1985).

NO. 99-1456

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Allen

v.

Texaco Inc

CIVIL ACTION SECTION "R"

June 14, 2001 filed

JUDGMENT

Considering the Court's order and reasons on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiff's complaint is hereby DISMISSED with prejudice.

New Orleans, Louisiana, this
Day of June 2001.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO: 99-1456
SECTION: "R" (4)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PHILLIP ALLEN

versus

TEXACO, INC.

ORDER AND REASONS

Defendant, Texaco, Inc., has moved this Court for summary judgment, seeking to dismiss all of plaintiff's claims against it. Because the Court finds that plaintiff, Phillip Allen, was the borrowed employee of Texaco, Inc., it GRANTS defendant's motion.

I. BACKGROUND

Phillip Allen was a payroll employee of Danos & Curole Marine Contractors, Inc. who was assigned to work as a roustabout/operator for Texaco aboard oil platforms located in the Gulf of Mexico. Allen contends that, while working on Texaco's West Cameron 643A platform on September 9, 1998, he sustained injuries when a wrench slipped while he was working on a malfunctioning pump during a storm.

Danos & Curole is in the business of supplying workers to various oil companies, including Texaco. It supplied its employees, purportedly including Allen, to Texaco pursuant to "Master Service Agreement." (See Def.'s Me. Supp. Mot. Summ. J. Ex. A.) This contract states that Danos & Curole shall perform as an "independent contractor" and that Texaco shall not exercise control over the employees of Danos & Curole. (See id. Ex. A ¶ 1 D.)

Texaco employed Allen to produce oil and gas from Texaco's lease site. At the time of the accident, the crew for the West Cameron 643A platform consisted of two Texaco payroll employees and one contract employee, plaintiff. (See id. Ex. B.) No supervisory personnel from Danos & Curole maintained a physical presence on the platform. Plaintiff worked seven days on/seven days off shifts, with Texaco determining plaintiff's work schedule and the amount of time he worked on the West Cameron 643A platform. (See id. Exs. B & D at 39). Texaco provided all food, lodging, and transportation to and from the platforms. (See id. Exs. B & E at 27). Texaco also provided all tools and equipment Allen needed to perform his work on the platform. (See id. Ex. B.)

Texaco provided plaintiff with daily work orders and job responsibilities. (See id.) Texaco personnel provided additional instructions to plaintiff on what plaintiff needed to do while working on the platform and what his responsibilities included. (See id. Exs. B & D at 51-52). Plaintiff routinely submitted reports to Texaco's production supervisor, and plaintiff attended all production meetings conducted and attended by Texaco personnel. (See id. Exs. B.) Under the Texaco and Danos & Curole contract, Danos & Curole billed Texaco for the hours plaintiff worked, and Danos & Curole issued plaintiff his paycheck. (See id. Ex. B.) Texaco had the right to discharge plaintiff from his job as an operator on the platform. (See id. Ex. B.)

Texaco moves for summary judgment on the grounds that plaintiff is Texaco's borrowed servant, and therefore plaintiff's exclusive remedy is workers compensation benefits under the LHWCA. Plaintiff argues that summary judgment is inappropriate because Texaco did not retain authoritative direction and control over the performance of his work and that Texaco merely monitored plaintiff's work. Rather, plaintiff asserts that he was an independent contractor working for Texaco.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. See FED. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986) . A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)). The moving party bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. See Celotex, 477 U.S. at 325, 106 5. Ct. at 2554; see also Lavespere, 910 F.2d at 178. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. See Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial. See id. at 325, 106 5. Ct. at 2553-54; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1996).

B. Borrowed Employee Doctrine

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, et seq., applies to this dispute because Allen was injured on an oil platform located on the Outer Continental Shelf, off the Louisiana coast. OCSLA provides that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950,

regulates the right to compensation of an injured platform worker. See 43 U.S.C. § 1333(b). Under the LHWCA, workers' compensation is the exclusive remedy for an employee against his "employer." See 33 U.S.C. §§ 904(a), 905(a). The Fifth Circuit has extended this tort immunity provision to include borrowing employers under the "borrowed employee" doctrine. See Total Marine Servs., Inc. v. Director, Office of Worker's Compensation Programs, 87 F.3d 774, 777 (5th Cir. 1996) (citing Hebron v. Union Oil Co., 634 F.2d 245 (5th Cir. 1981); Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977)); Melancon v. Amoco Prod. Co., 834 F.2d 1238, 1243-44 (5th Cir. 1988) (citations omitted) . Workers' compensation also provides the exclusive remedy for an employee injured "by the negligence or wrong of any other person or persons in the same employ." 33 U.S.C. § 933(i). Accordingly, if this Court determines that Allen was Texaco's borrowed employee, Texaco will be vested with § 933(i) immunity.

The district court determines the issue of borrowed employee status as a matter of law. See Capps v. N.L. Baroid-NL Indus., Inc., 784 F.2d 615, 617 (5th Cir. 1986) (citing Gaudet, 562 F.2d at 357-58); Melancon, 834 F.2d at 1244. "~I]f sufficient basic factual ingredients are undisputed, the court may grant summary judgment." Capps, 784 F.2d at 616 (citing Gaudet, 562 F.2d at 358-59). In Ruiz v. Shell Oil Co., the Fifth Circuit outlined nine factors to be used to determine whether the borrowed employee doctrine applies. 413 F.2d 310, 312-13 (5th Cir. 1969). These factors include the following considerations:

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details of cooperation?

2. Whose work is being performed?

3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

4. Did the employee acquiesce in the new work situation?

5. Did the original employer terminate his relationship with the employee?

6. Who furnished the tools and the place of performance?

7. Was the new employment over a considerable length of time?

8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

See id. See also Melancon, 834 F.2d at 1244. Although no single factor or combination thereof is determinative, the Fifth Circuit has generally considered the factor of control to be central. See Brown v. Union Oil Co., 984 F.2d 674, 676 (5th Cir. 1993); Melancon, 834 F.2d at 1245; Capps, 784 F.2d at 617. However, in Gaudet, the Fifth Circuit deemphasized the control factor and found that only the fourth, fifth, sixth, and seventh factors should be considered "essential." 562 F.2d at 356. See Brown, 984 F.2d at 677 n.2.

1. Who had Control Over the Employee and the Work He was Performing?

Determination of the control factor requires the Court to distinguish "'between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.'" Ruiz, 413 F.2d at 313 (quoting Standard Oil Co. v. Anderson, 212 U.S. 215, 222, 29 5. Ct. 252, 254 (1909)).

Danos & Curole furnished plaintiff's services as a platform worker to Texaco under a "Master Service Agreement," which states that Texaco has no control of Danos & Curole's employees. (See Def.'s Mem. Supp. Mot. Summ. J. Ex. A ¶

1D.) At the time of the accident and for the seventeen months prior to the accident, plaintiff was the only Danos & Curole employee on the Texaco platform and did not have anyone from Danos & Curole assisting or supervising his work. (See id. Ex. D. at 43.) Plaintiff testified that he received his daily assignments from Texaco personnel. (See id. Ex. D. at 51.) Texaco personnel also supervised Danos & Curole employees on Texaco platforms. (See id. Ex. C at 75.) Plaintiff's direct supervisor was a Texaco employee. (See id. Ex. E at 106, 120, 121.) Texaco set plaintiff's work schedule, determined when crew changes occurred, and decided whether or not to discharge Danos & Curole employees, such as plaintiff, from Texaco assignments. (See id. Ex. E at 14 & 76.) Further, Texaco decided whether to evacuate plaintiff from the platform and who was essential to the platform's operation. (See id. Ex. E at 18, 30-31.) Moreover, Danos & Curole did not have any representatives on the platform to supervise or direct plaintiff's work for the last seventeen months of plaintiff's job aboard the platform. (See id. Ex. D at 49-50.) Danos & Curole's personnel coordinator testified that he had no knowledge of how plaintiff conducted his job. (See id. Ex. E at 71.) Thus, Texaco argues that there is thus no factual dispute as to who supervised plaintiff's work on the platform. Compare Brown, 984 F.2d at 678 (issue of fact on borrowed employee status when conflicting testimony regarding whether payroll employer or platform owner instructed plaintiff on how, when and where to perform his cleaning duties).

That plaintiff used his own discretion in evaluating the safety of tasks without direction from Texaco does not preclude a finding of borrowed employee status when Texaco personnel told them "what work to do, and when and where to do it." Melancon, 834 F.2d at 1245. This Court does not interpret the control factor to require that the borrowed employer direct each and every action taken by the borrowed employee. Moreover, that Danos & Curole personnel spoke with plaintiff during the storm, met with plaintiff on his days off, gave plaintiff the authority to refuse work if he felt unsafe, and told plaintiff to contact Danos & Curole if anything

endangered him does not defeat borrowed employee status because these contacts were only incidental to the central purpose of his employment, to maintain gas production from Texaco's platform. See Moody v. Callon Petroleum Operating Co., 1999 WL 596268, at *3 (E.D. La. Aug. 3, 1999) . Although plaintiff makes much of facts indicating that Danos & Curole showed "concern" for him when he was left on Texaco's platform during a storm in the Gulf, such a natural inclination does not change the nature of plaintiff's relationship with Texaco. After reviewing all of the relevant deposition testimony and other evidence, the Court finds that the supervision and instruction provided by Texaco rose above "mere suggestion of details or cooperation." Accordingly, the control factor weighs in favor of finding that plaintiff was Texaco's borrowed employee status as to plaintiff.

2. Whose Work was Being Performed?

There is no dispute that Danos & Curole provided personnel and services to Texaco to assist in the operation of the West Cameron 643A platform. The West Cameron 643A is owned and operated by Texaco. (See Def.'s Mem. Supp. Summ. J. Ex. B.) The record indicates that the maintenance and operations conducted by plaintiff did in fact promote Texaco's operations. Accordingly, the second factor weighs in favor of borrowed employee status.

3. Was there an Agreement or Understanding Between the Original and the Borrowing Employer?

Danos & Curole entered into a master service contract with Texaco. This contract provides in pertinent part:

D. Contractor's Status

The parties acknowledge that Contractor is an independent Contractor. As such, Texaco shall have no voice in the discharge supervision, or control of Contractor's employees, representatives or subcontractors or in fixing their numbers, compensation, or hours of service. Texaco shall have no right

to control the manner of Contractor's performance but Texaco and its representatives shall have the right to inspect the work performed and to make suggestions and comments thereon.

(See id. Ex. A.) Although the contract specifically calls for Danos & Curole to be considered an independent contractor, the Fifth Circuit has held that such a contract provision does not automatically negate borrowed employee status. See Brown, 984 F.2d at 677-78; Melancon, 834 F.2d at 1245. "The reality at the work site and the parties' actions in carrying out a contract . . can impliedly modify, alter, or waive express contract provisions." Melancon, 834 F.2d at 1245 (citations omitted). Analyzing contract language, the Melancon court held that the provision did not negate borrowed employee status when the nominal employer clearly understood that plaintiff would take his instructions from the borrowed employer. See id. As discussed supra, the evidence here indicates that Danos & Curole did not instruct plaintiff on how to perform his duties on the Texaco platform. Indeed, Danos & Curole's personnel coordinator testified that the contract's terms did not reflect the reality of the situation. In fact, when asked if the Danos & Curole and Texaco relationship was consistent with the contract, Ronald Ratcliff, Danos & Curole's account manager and former personnel coordinator, answered as follows:

Q: My question was: Is your understanding of the relationship, as it worked day by day in the relationship with Texaco, consistent with what you just read?

A: Well, can I see it again?

Q: Yes, sure.

A: I mean, it's a tough question because, I mean, they [Texaco] have full voice in discharge. They have full voice in compensation. They have full voice in supervision. I mean, they tell us when they don't want an employee. It's not us telling them we don't think he should work out there for you

no more. It's them telling us when our employees should get a raise. This says one thing, but some things happen differently. Just because they're under Texaco's supervision, they see their job daily performance. That says that, but you know, I can't give a raise unless Texaco approves it.

* * *

Q: And it says as such, Texaco will have no voice in the discharge. You say they have all the voice in the discharge?

A: Yes. If they don't want somebody, then we replace them.

Q: They tell you all to replace them?

A: That's our business.

Q: What would happen, if Texaco didn't like what an employee was doing, they would tell you and it would be your company's job to discharge them?

A: Yes.

Q: What about supervision or control of the contractor's employees?

A: What you mean by supervision?

Q: Supervision and control.

A: Every field has a field foreman.

Q: And the filed foreman is an employee for whom?

A: Texaco.

(See Def.'s Mem. Supp. Summ. J. Ex. E at 14-16.) Thus, in reality, Texaco had control of discharge and compensation and Danos & Curole employees were under Texaco's

supervision. (See id.) Even plaintiff himself testified that he received his daily instructions from Texaco personnel. (See id. Ex. D at 51.) Like Melancon, Texaco told plaintiff "what work to do, and when and where to do it." 834 F.2d at 1245. The Court thus finds that the contract provision was altered by the reality at the work site, and the provision does not prohibit a finding of borrowed employee status.

4. Did the Employee Acquiesce in the New Work Situation?

"The focus of this factor is whether the employee was aware of his work conditions and chose to continue working in them." Brown, 984 F.2d at 678. Here, plaintiff worked on the Texaco platform for two years without lodging any complaints about his working conditions. See Brown, 984 F.2d at 678 (one month sufficient time to appreciate new work conditions) ; Cobb v. SIPCO Servs. & Marine, Inc., 1997 WL 159491 (E.D. La. 1997) (Vance, J.) (two months). Moreover, plaintiff knew that his nominal employer, Danos & Curole, was a contract company that loaned temporary employees to other companies and that Texaco was one of those companies. (See Def.'s Mem. Supp. Mot. Summ. J. Ex. D at 39.) Plaintiff understood that the West Cameron 643A was owned by Texaco and that Texaco personnel instructed plaintiff on what to do while working on this platform. (See id. Ex. D at 39 & 51-52.) In fact, in his deposition plaintiff himself characterized his job as "working for Texaco." (See id. Ex. D at 45 & 48.) Plaintiff shared the same duties as Texaco operators and participated in production meetings conducted by Texaco personnel. (See id. Ex. B.) This factor indicates that plaintiff acquiesced in the Texaco work arrangement and favors borrowed employee status.

5. Did the Original Employer Terminate his Relationship with the Employee?

This factor does not require the lending employer to sever completely its relationship with the employee, because such a requirement would effectively eliminate the borrowed employee doctrine. See Melancon, 834 F.2d at 1238; Capps, 784 F.2d at 617-18. Rather, the court examines the lending employer's relationship with the employee while the borrowing occurs. See Capps, 784 F.2d at 618. Danos & Curole hired plaintiff and gave him the Texaco assignment; however, Danos & Curole's personnel coordinator testified that he has no knowledge regarding plaintiff's daily work performance and responsibilities. (See id. Ex. E at 71.) Plaintiff admitted that Texaco personnel assigned daily tasks to plaintiff. (See id. Ex. D at 51-52.) Plaintiff has submitted no evidence that the contact between plaintiff and Danos & Curole while plaintiff was on the job site consisted of more than occasional visits and phone calls from Danos & Curole. Based on this evidence, the Court finds that factor five weighs in favor of borrowed employee status.

6. Who Furnished the Tools and the Place of Performance?

Texaco furnished plaintiff with the place of employment, meals, lodging, and transportation to and from work. Texaco also provided plaintiff with the tools he needed on the job. (See id. Exs. B.) There is no evidence that Danos & Curole provided plaintiff with any tools needed to perform his work assignments. This factor also favors borrowed employee status.

7. Was the New Employment Over a Considerable Length of Time?

The Fifth Circuit has held that when "the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee, " but that "the converse is not true." Capps, 784 F.2d at 618. The Capps court

found this factor neutral on borrowed employee status when the employee's injury occurred on the first day of the job. See id. Here, plaintiff had worked for Texaco for approximately two years prior to the alleged accident. The Court finds that the length of employment favors borrowed employee status.

8. Who Had the Right to Discharge the Employee?

While Texaco did not have the right to terminate plaintiff's employment with Danos & Curole, it did have the right to terminate his relationship with Texaco. (See Def.'s Mem. Supp. Mot. Summ. J. Ex. E 14-16.) This fact favors borrowed employee status. See Melancon, 834 F.2d at 1216; Capps, 784 F.2d at 618.

9. Who Had the Obligation to Pay the Employee?

Finally, with respect to the last factor, Danos & Curole paid plaintiff with funds received from Texaco. Danos & Curole billed Texaco for the hours plaintiff worked and would in turn issue a paycheck to plaintiff. (See Def.'s Mot. Summ. J. Ex. B.) The Fifth Circuit has consistently held that this type of payment arrangement weighs in favor of a finding of borrowed employee status. See Melancon, 834 F.2d at 1246; Capps, 784 F.2d at 618.

III. CONCLUSION

For the foregoing reasons, the Court finds no factual dispute as to the Ruiz factors and that, as a matter of law, the facts overwhelmingly support a finding that plaintiff was Texaco's borrowed employee. As such, the LHWCA bars plaintiff's suit against Texaco. The Court hereby GRANTS defendant's motions for summary judgment and dismisses plaintiff's claims against Texaco with prejudice.

New Orleans, Louisiana, this 5th day of June, 2001.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

TEXACO INC.

MASTER WORK AGREEMENT WITH
INDEPENDENT CONTRACTOR

This Agreement, made and entered into in New Orleans, Louisiana, dated as of the 23rd day of March 1997, by and between Texaco Inc., a Delaware corporation with offices in New Orleans, Louisiana (hereinafter referred to as "Texaco"), and Danos & Curole Marine Contractors, Inc., a Louisiana corporation, with off ices in Larose, Louisiana (hereinafter referred to as "Contractor").

1. WORK TO BE PERFORMED; MATERIAL, EQUIPMENT, AND SERVICES TO BE PROVIDED; CONTRACTOR'S WARRANTY; CONTRACTOR'S STATUS; AND SUBCONTRACTORS

   A. Work To Be Performed. In consideration of the payments to be made pursuant to Paragraph 2, Contractor promises and agrees to perform the following work: Roustabouting, construction work and general oilfield maintenance at Texaco's various leases and/or properties in what is known as Texaco's New Orleans Operations Division. Work is to be performed as set forth in Exhibit "A" attached hereto and made a part hereof; said work shall be more fully described in Texaco's specifications and/or written instructions, as provided from time to time during Contractor's performance, to be attached hereto as Exhibit "B" and made a part hereof. Unless otherwise agreed to in writing by an authorized representative of Texaco, all, work which Contractor agrees to perform and/or performs for Texaco's New Orleans Operations Division shall be performed according to the terms, conditions, and provisions set out herein, if and when said work is directed to be performed from time to time by Texaco.

B. Material, Equipment, and Be Provided. Contractor agrees, at its sole cost, to purchase and deliver or to provide all materials, equipment, and services reasonably necessary to perform Contractor's obligations under this Agreement except as provided by Texaco under Article 6.D., "Material, Equipment and Services To Be Provided".

C. Contractor's Warranty. Contractor warrants that all work performed under this Agreement shall be performed in a good and workmanlike manner, that all materials and equipment furnished by Contractor shall be of good and merchantable quality, and unless otherwise specified in writing by Texaco shall be new and not previously used, and that all work, materials and equipment furnished by Contractor shell be free of defect.

D. Contractor's Status. The parties acknowledge that Contractor is an independent Contractor. As such, Texaco shall have no voice in the discharge, supervision, or control of Contractor's employee, representatives or subcontractors or in fixing their number, compensation or hours of service. Texaco shall have no right to control the manner of Contractor's performance but Texaco and its representatives shall have the right to inspect the work performed and to make suggestions and comments thereon.

E. Subcontractors. If Contractor shall cause any part of the work hereunder to be performed by a subcontractor, the provisions of this Agreement shall apply to such subcontractor and his or its employes in all respects as if he or it were employes of Contractor, and Contractor shall be liable for the work of the subcontractor accordingly. Prior to entering into any agreement with any subcontractor to provide any services and/or materials in connection with the work to be performed

hereunder, Contractor shall submit for Texaco's review and written approval a general list of the major subcontractors which contractor might utilize in the performance of the work. Contractor shall be free to use any subcontractor not objected to by Texaco. Texaco's approval of or failure to reject any subcontractor shall not affect the provisions of this Agreement.

2. CONSIDERATION PAYABLE TO CONTRACTOR TERMS OF PAYMENT AND TIME FOR PAYMENTS

A. In consideration of the performance undertaken by Contractor, Texaco shall pay to Contractor either:

(1) An amount determined in accordance with the Contractor's Rate Schedule dated January 11, 1982 and all amendments thereto, marked by Texaco as Exhibit "A" and bearing the effective date of the Agreement, or the date on which Texaco accepts any amendments thereto.

(2) A fixed turnkey sum agreed upon in writing, which may include, but is not limited to bid and award documents. Additions, deletions and or changes to the fixed price shall be made in accordance with the provisions of Article 7.B. of the Agreement, unless expressly modified by said written documents.

CONTRACTOR SHALL GIVE TEXACO THIRTY (30) DAYS PRIOR WRITTEN NOTICE OF ANY PROPOSED CHANGE IN CONTRACTOR' S RATE SCHEDULE. IN NO EVENT SHALL ANY INCREASE IN CONTRACTOR'S RATE SCHEDULE BE EFFECTIVE UNLESS AND UNTIL THE CHANGE IS APPROVED IN WRITING BY TEXACO AND THIS AGREEMENT PROPERLY AMENDED .

B. Terms of Payment. Texaco shall pay to Contractor the consideration described in Paragraph ZA as

follows:

Contractor shall furnish work tickets EACH DAY to Texaco's representative for his verification reflecting agreement number, location of job, description of equipment, materials or supplies furnished, names of Contractor's employes, and the number of hours worked, in a form of work ticket acceptable to Texaco. All work tickets shall be prepared in strict accordance with the classifications contained in the Contractor's Rate Schedule, Exhibit "A". In no event shell the representative's signature indicate an acceptance of any terms or conditions which may be contained on Contractor's work ticket.

All Contractor's invoices for work performed for Texaco shall be rendered as promptly and currently as Contractor's established procedures shall permit. Contractor's invoices must be rendered in accordance with the terms and provisions of this Agreement, and bearing the Agreement Identification Number, and be in sufficient detail to permit ready identification with Contractor's daily time sheets or work tickets and for processing against and comparison with the Agreement and the current contractor's Rate Schedule, Exhibit "A".

Should the work be authorized on a firm turnkey price basis, payment by Texaco for material, equipment, fabrication and/or installation shall be made in the following manner after Texaco's approval of invoices covering these items:

Texaco shall pay 85% of the amount of these invoices within thirty (30) days after such billing and approval of such invoices. The remaining 15% shall be paid after final acceptance (to be given by Texaco in accordance with the provisions of this Article 2.B. and Article 6.E., "Acceptance of Work") of all items covered by the Agreement. At no time during the duration of the work shall Contractor be paid an amount greater than 85% of the total Agreement price agreed

upon, invoices shall be submitted in the following manner:

(1) Major Equipment and Materials - Upon receipt from vendor.

(2) Fabrication - Monthly for that portion considered completed by Texaco's representative and Contractor during the invoice period.

(3) Installation - Monthly for that portion considered completed by Texaco's representative and Contractor during the invoice period.

After final acceptance of the contracted work (to be given in accordance with Article 6.E., "Acceptance of Work"), final settlement shall be made and all money due Contractor shall be paid by Texaco upon completion of the following:

(1) Contractor has provided Texaco with written certification and evidence of Contractor's compliance with all existing laws and/or regulations of all governmental and municipal bodies with respect to the work performed hereunder.

(2) Contractor has provided Texaco with satisfactory evidence of due payment of all bills, claims, charges and obligations for labor, materials or services rendered or incurred in connection with this Agreement.

(3) Contractor has provided Texaco with satisfactory evidence of the fact that no liens have been filed or recorded against Texaco, Texaco's property or the property subject to this Agreement.

(4) Contractor has provided Texaco with satisfactory evidence of Contractor's settlement of any and all claims for damages, injuries or death arising out of the work performed under this Agreement, including, without limitation, any personal injury claims.

(5) Contractor has provided Texaco a release by an officer of the company, in authentic form, releasing Texaco, its officers, agents, employee and persons for whom Texaco is responsible from any and all claims of the Contractor arising under this Agreement.

Payment by Texaco of any monies to Contractor for completion of portions of work shall not amount to nor be construed as acceptance of such work or materials for which said monies are paid, nor shall such payment amount to the release of any obligations of the Contractor or a waiver by Texaco of any of its rights under this Agreement.

C. Time For Payments. Except where otherwise provided herein payments to be made under the terms of this Agreement shall be made WITHIN THIRTY (30) DAYS AFTER TEXACO HAS RECEIVED AN INVOICE, in proper form, evidencing that amounts are due as well as Contractor's written verification, supported by proper evidence, that no liens, claims, privileges, or liabilities exist with respect to the work performed, and Contractor's written promise to satisfy or discharge any such lien, claim, privilege, or liability arising out of Contractor's work, within five (5) days of the receipt of a written demand by Texaco. No partial payment made by Texaco shall be construed or deemed to be an acceptance of any work performed.

3. TIME FOR PERFORMANCE AND AGREEMENT TERM

This Agreement shall be effective as of the date above stated and shall remain in effect until cancelled by either party upon giving the other party ten (10) days prior written notice thereof. Should Texaco elect to authorize Contractor to perform work under this Agreement, the time of performance shall be that specified by Texaco or agreed upon by the parties. This Agreement cancels and supercedes Agreements with Independent Contractor

No. H-83-04 dated February 1, 1983 and No- MC-5-82 dated January 13, 1982.

4. RISK ALLOCATION, IDEMNITY, FORCE MAJEURE, INSURANCE, POLLUTION CONTROL

A. Risk Allocation. Contractor agrees that it shall bear the risk of loss, destruction, injury or damage to the object of work to be performed hereunder until such time as Texaco has, in writing, unconditionally accepted Contractor's work and all of the components of that work.

The provisions of this Article 4.A. shall not apply when the extent of the work performed by Contractor hereunder is solely the maintenance, replacement, repair or salvage of equipment already owned or leased by Texaco and located on Texaco's premises at the time of the work.

B. Indemnity.

(1) Contractor covenants and agrees to indemnify, defend, and hold Texaco, its subsidiaries and affiliated companies, their agents, employes, and persons for whom each is responsible (hereinafter, collectively and individually, called "Texaco") free and harmless from and against any and all actions, causes of action, claims, costs (including attorney's fees and court costs), damages, judgments or liabilities in connection therewith which may be asserted by Contractor, its agents, employes, subcontractors and persons for whom Contractor is responsible (hereinafter, collectively and individually, called "Contractor), Texaco's agents, employes and persons for whom Texaco is responsible, or any third parties, on account of personal injury or death, or property damage caused by, arising out of, or in any way incidental to, or in connection with the performance of the

work hereunder, whether such personal injury or death or property damage was caused by Contractor's sole fault or liability, the concurrent fault or liability of the Contractor and Texaco, or the sole fault or liability of Texaco, whether such fault or liability is based on a theory of negligence, strict liability, or a combination thereof.

(2) In the event that this Contract is subject to Louisiana Revised Statute 9:2780 as enacted by the Legislature of Louisiana, and so long as that Statute is in force, then;

a. Contractor covenants and agrees to fully indemnify, defend and hold Texaco, its subsidiaries and affiliated companies, their agents, employes, and persons for whom each is responsible (hereinafter, collectively end individually, called "Texaco") free and harmless from and against any and all actions, causes of action, claims, costs (including attorney's fees and court costs), damages, judgments or liabilities in connection therewith which may be asserted by Contractor, its agents, employes, subcontractors and persons for whom Contractor is responsible (hereinafter, collectively and individually, called "Contractor"), Texaco's agents, employes, and persons for whom each is responsible, or any third parties on account of death or personal injury of any person, caused by, arising out of, or in any way incidental to, or in connection with the performance of the work hereunder, except that if Texaco shall be solely at fault or liable, whether under a theory of negligence, strict liability or combination thereof, in factually and proximately causing the particular death or injury, then this indemnity shall not apply. In the event that Contractor

and Texaco shall be concurrently at fault of liable, whether under a theory of negligence, strict liability or combination thereof, then Contractor shall indemnify, defend and hold Texaco free and harmless from and against any and all actions, causes of action, claims, costs (including attorney's fees and court costs), damages, judgments or liabilities except to the extent of Texaco's comparative fault or liability, whether such fault or liability is based on a theory of negligence, strict liability, or a combination thereof.

b. Contractor covenants and agrees to fully indemnify, defend and hold Texaco, its subsidiaries and affiliated companies, their agents, employee, and persons for whom each is responsible (hereinafter collectively and individually called "Texaco") free and harmless from and against any and all actions, causes of action, claims, costs (including attorney's fees and court costs), damages, judgments or liabilities arising out of any injury, damage or effect other than those described in Paragraph "a." hereof, including such injury, damage or effect caused by the sole fault or liability of Texaco, whether such fault or liability is based on a theory of negligence, strict liability or combination thereof,

(3) In the event that any Paragraph or portion of this indemnity is found by a court of competent jurisdiction to be invalid or unenforceable, then that Paragraph or portion as the case may be shall be stricken as if it were never contained in this Agreement but the remaining provisions of that Paragraph and of this Agreement shall remain in full force and effect.

(4) Contractor further agrees to indemnify, defend, and hold Texaco, its subsidiaries and affiliated companies, their agents, employes, and persons for whom each is

responsible harmless from any claim, demand, action, or cause of action based on or arising out of the infringement of any patent.

Contractor agrees to indemnify and hold Texaco, its subsidiaries and affiliated companies, harmless from any claims, costs, demands, fines, causes of action, and losses arising out of or connected with any failure or violation by Contractor while performing under this Agreement of any laws, standards, regulations and orders of all government and municipal bodies having jurisdiction, including, without limitation, those described in Exhibits "C" and "D", entitled "Contract Supplement" and "Nondiscrimination in Outer Continental Shelf Contracting • 30 CFR 270", respectively, attached hereto and made a part hereof.

(5) Notwithstanding any other provision of this Agreement, Contractor covenants and agrees that its obligations, duties and liabilities under Paragraph 4.B of this Agreement entitled "Indemnity" are independent of and in no way connected with any other provision of this Agreement, including but not limited to Paragraph 4 .D entitled "Insurance", and the indemnities and hold harmless granted under Paragraphs 4.E and 5.B, respectively entitled "Pollution Control" and "Permits and Taxes", and accordingly shall not be limited, restricted, or in any way affected by any other provision of this Agreement, including but not limited to Paragraphs 4.D., 4.E. and 5.B. hereof.

C. Force Majeure. In the event that performance under this Agreement shall become impossible because of the occurrence of an event not within the control of any party to this Agreement and not contemplated by the parties then performance under this Agreement shall be excused only during the time that performance is made impossible. Texaco shall have the right to terminate this Agreement if performance is made impossible for more than ten (10) days so long as Texaco shall pay to

Contractor the reasonable value of work already performed.

D. Insurance.

Contractor shall maintain, at its sole cost, and shall require any subcontractors it may engage to maintain, at all times while performing work hereunder, the insurance coverage, where applicable, set forth below with companies satisfactory to Texaco and endorsed to cover operations in the Gulf of Mexico, Atlantic Ocean, and all other operations to be performed under this Agreement. A certificate naming Texaco, its subsidiaries and affiliated companies as additional insured and evidencing the Comprehensive General Liability and Excess Liability coverages specifically quoting the indemnification provision set forth in this Agreement, shall be delivered to Texaco immediately upon execution of this Agreement. Such certificate shall provide that any change restricting or reducing coverage or the cancellation of any policies under which certificates are issued shall not be valid as respects Texaco's interest therein until Texaco has received 30 days notice in writing of such change or cancellation. Further, it shall state that it is primary coverage and not concurrent or excess over other valid insurance which may be available to Texaco. The certificate shall also state on its face the basis for each type of coverage. Should any coverage be provided on a claims made basis, the policy shall include at least a two (2) year extended reporting period endorsement, and shall not contain a "prior acts" exclusion. Contractor further agrees to comply with all terms and conditions of the insurance contract.

(1) Workers' Compensation Insurance as required by laws and regulations applicable to and covering employes of Contractor engaged in the performance of the work under this Agreement.

(2) Adequate Employers' Liability Insurance protecting Contractor against common law liability, in the absence of statutory liability, the employe bodily injury arising out of the master-servant relationship; and having the following endorsements;

a. To provide against liability under the U. S. Longshoremen's and Harbor Workers Compensation Act, as amended, including protection with respect to the extension of this Act under the Outer Continental Shelf Land Act.

b. To provide against liability under the "Jones Act", Death on the High Seas Act and the General Maritime Law.

c. To provide that a claim "in rem" shall be treated as a claim against the employer.

(3) Adequate Comprehensive General Public Liability Insurance providing coverage for all operations required to fulfill this Agreement, including products/completed operations. Territorial Units shall include Gulf of Mexico and Atlantic Ocean operations. This policy shall cover, among other risks, the contractual liability assumed under the indemnification provision set forth in this Agreement.

(4) Adequate Automobile Liability Insurance, including non-owned and hired vehicle coverage.

(5) Liability insurance over Comprehensive General Liability and Comprehensive Automobile Liability coverages afforded by the primary policies described above, with adequate limits in excess of the specified limits.

(6) Protection and Indemnity Insurance and Full Hull

Insurance on all vessels and other watercraft owned, chartered or operated by Contractor.

(7) Full Machinery and Equipment Insurance covering Contractor's equipment and appliances used in connection therewith in amounts sufficient to cover the replacement value of said equipment and appliances with proper endorsements providing appropriate navigation limits.

Each policy shall also be endorsed to provide waiver of subrogation rights in favor of Texaco, its subsidiaries and affiliated companies and all other parties owning an interest in the property on which work covered by this Agreement is to be performed.

Contractor agrees to require all subcontractors to carry adequate Marine Insurance on service vessels furnished by such subcontractors and to furnish Texaco schedules of this insurance coverage.

Failure of the Contractor to keep the required insurance policies in full force and effect during the work covered by this Agreement shall constitute a breach of this Agreement and Texaco shall have the right, in addition to any other rights, to immediately cancel and terminate this Agreement without further cost to Texaco.

Nothing contained in these provisions relating to coverage and amounts set out herein shall operate as a limitation of Contractor's liability in tort or contracted for under the terms of this Agreement.

In the event that this Agreement is subject to Louisiana Revised Statute 9:2780 enacted by the Legislature of Louisiana, and so long as that statute is in force, then Contractor shall not be required to name Texaco, its subsidiaries and affiliated companies, as an additional insured nor shall Contractor be required to obtain a waiver of subrogation endorsements as to Texaco, its subsidiaries and

affiliated companies. Notwithstanding the foregoing, Texaco its subsidiaries and affiliated companies, shall have the right to contact Contractor's insurer and purchase from that insurer additional insured and waiver of subrogation endorsements to Contractor's policy. Contractor agrees to cooperate with Texaco in dealing with Contractor's insurer.

E. Pollution Control. Pollution Control shall be maintained in connection with all operations by Contractor. Additions or alterations to existing equipment used by Contractor in the performance of this Agreement shall be made by Contractor at its sole expense and shall incorporate any equipment necessary to maintain the Plant and/or Rig, and/or equipment, vehicles and adjacent area free of all hazardous or harmful emissions, spillage, discharge and other pollutants, and to avoid any such conditions from arising in violation of local, state or federal laws and regulations.

If any emitting, spilling, venting, discharging, disposal or loss of any hazardous or harmful substances, air contaminants, and/or pollutants of any nature or kind (referred to hereinafter as "discharges") which are in violation of local, state and federal laws and regulations or standards occur as a result of the performance of this Agreement by Contractor its agents, employes, subcontractors or persons for whom it is responsible, Contractor shall immediately proceed, at its sole costs and expense, to stop or abate such discharges, and hereby further agrees to indemnify, protect and hold Texaco its subsidiaries and affiliated companies, harmless therefrom. Accordingly, Contractor shall be fully responsible to Texaco and any and all, parties for any and all fines, costs and losses of any kind in any way connected with such discharges, including cost of cleanup operations and installation of and repair of necessary equipment. Contractor agrees to indemnify and hold Texaco, its subsidiaries and affiliated companies, their agents, and employes harmless from and against any and all expenses and costs, including

costs of court, attorney's fees, and penalties or fines imposed by any law, rule, standard, or regulation in any way connected with the occurrence of the discharges.

Contractor agrees that it shall comply, at its sole cost and expense, with any and all laws, rules, regulations, orders, and standards promulgated in connection with and applicable to the performance and execution of all work contracted for under this Agreement; and further agrees that it shall comply with any and all local, state and federal laws, regulations, standards, and orders of all state and federal political subdivisions and agencies, applicable to the controlling, regulating and prevention of pollution, disposal and discharges. Additionally, Contractor agrees to abide by the terms set forth on Exhibit "E" attached hereto and made a part hereof.

5. CONTRACTOR'S OBLIGATIONS IN PERFORMING UNDER THIS AGREEMENT

A. Reliance on Prior Inspection. Contractor acknowledges that all obligations undertaken and all promises made are based on inspections and investigations made by Contractor and that Contractor understands the nature of the work to be performed, the obligations undertaken, and the promises made.

B. Permits and Taxes. Contractor agrees to procure all permits and licenses required to perform the work hereunder. Contractor further agrees to pay all taxes which may become due as a result of the work performed. Contractor accepts responsibility and liability for payment of federal and state payroll taxes and for contributions for unemployment insurance, old age pensions, annuities, retirement, and other benefits, imposed or assessed under any provisions of any law and measured by wages, salaries or other remuneration paid or payable by Contractor to employes of Contractor engaged in

said work or in any operation incidental thereto, and agrees that each subcontractor shall accept the same responsibility and liability with respect to employee of such subcontractor. Contractor agrees that Contractor and all subcontractors shall enter into any agreement prescribed by any federal or state governmental body to effectuate the purposes hereof, and shall comply with all regulations respecting assumption of liability for such taxes and contributions. Contractor further agrees to indemnify and save Texaco harmless against all claims, taxes, penalties, interest, and costs which ,au be made or assessed against Texaco under any such law, rule, or regulation with respect to employes of Contractor and of any subcontractor.

C. Protect Work. Contractor agrees to adequately protect all work and Texaco's property and to take steps to protect all persons and Texaco's property from death, injury, or damage arising out of Contractor's work and to provide and maintain facilities necessary to insure safe working conditions or in accordance with applicable governmental authority.

D. Compliance. Contractor agrees to comply with all applicable regulations, ordinances, and rules in performing hereunder. Contractor further agrees to comply with any rules in existence or promulgated during Contractor's performance and imposed by Texaco which is intended to minimize risks of death, injury, or property damage reasonably related to Contractor's work. Contractor also agrees to comply with those statutes, rules, and orders described on Exhibits "C", "D" and "F" entitled "Contract Supplement" and "Nondiscrimination in Outer Continental Shelf Contracting - 30 CFR 270", and "Louisiana Contractors' Licensing Law", respectively, attached hereto and made a part hereof.

E. Failure of Contractor to Perform. Contractor authorizes Texaco to deduct from any amount payable to Contractor (whether or not arising out of this Agreement) all amounts which may be payable by Contractor to Texaco, and also all amounts for which Texaco may become liable to third parties by reason of Contractor's acts in performing or failing to perform its obligations under this Agreement. In the event that any claim is made by a third party, the amount or validity of which is disputed by Contractor, or any indebtedness exists which may appear to be the basis for a claim of lien, Texaco may withhold from any payment due, without liability for interest, an amount sufficient to cover such claim. The failure of Texaco to exercise this right to deduct or to withhold shall not affect the obligation of Contractor to protect Texaco as provided herein.

Contractor agrees that if it shall fail to work for a period of five (5) consecutive days or if Contractor shall breach any provision of this Agreement, Texaco shall have the right (without first giving notice of breach or demanding performance) to declare this Agreement breached and to seek any and all remedies available to Texaco. Texaco shall have the right to remove Contractor from the job and to act as Texaco sees fit in remedying Contractor's breach. The failure of Texaco to assert a breach for the failure of Contractor to perform at any time shall not be construed to be a waiver of Texaco's rights hereunder.

F. Assurances - At Texaco's sole discretion, and as a prerequisite to the commencement of any work under this Agreement, Contractor may be required to obtain a Performance and Payment Bond (in an amount acceptable to Texaco and with a surety company selected by Contractor and acceptable to Texaco), an irrevocable letter of credit in favor of

Texaco (in an amount and form and with terms acceptable to Texaco), or any other assurance acceptable to Texaco. Texaco agrees to reimburse Contractor for the cost of obtaining the assurance.

G. Subsidiaries - Contractor agrees to perform work, if and when work is directed to be performed from time to time and agreed to by Contractor, under the terms and conditions of this Agreement, for the following Texaco Inc. subsidiaries:

Texaco Producing Inc.
Texaco Oils Inc.
Getty Oil Company

all Delaware corporations.

Contractor further agrees that the above-named subsidiaries are separate and distinct parties to this Agreement, and in this regard, wherever the word "Texaco" appears in this Agreement, and including but not limited to Paragraphs 4.B., 4.D. and 4.E., it shall be considered to mean the party for whom the work is being performed whether Texaco Inc. or the above-named subsidiaries. Accordingly, Contractor agrees that the rights, duties and obligations of Texaco Inc. and each of the above-sated subsidiaries to the Contractor, and the rights, duties and obligations of the Contractor to Texaco Inc. and each of the above-named subsidiaries are separate and distinct.

Contractor further agrees to provide each of the above- named subsidiaries with additional insured and waiver of subrogation endorsements to the same extent that these endorsements were provided Texaco Inc. in accordance with Paragraph 4.D.

Contractor also agrees to make billings in the name of the party for whom the work was performed.

The representative of Texaco Inc. designated in Paragraph 7.H. shall also be the designated representative of each of the above-named subsidiaries.

H. Liens Attachments or Other Encumbrances _ Contractor shall not at any time or times during the term hereof or any time thereafter suffer or permit any lien, attachment, or encumbrance to be imposed by any person, firm, or corporation upon the work performed hereunder or Texaco's land or property or any portion of the site on which the work hereunder is to be carried on by reason of any claim or demand against Contractor or Contractor's agents, employes, subcontractors or other representatives and any such lien, attachment, or other encumbrance, until Contractor shall have secured the release thereof, shall preclude any claims or demands by Contractor for any payment whatsoever under or pursuant to this Agreement and in the event that the same shall not have been removed within five (5) days after written notice by Texaco, Texaco, at its option, may remove or release the same and Contractor shall reimburse Texaco for the cost of removal thereof including any legal fees and expenses and interest at the rate of ten (10) percent per annim from the date of payment by Texaco. Contractor hereby agrees to indemnify and hold harmless Texaco, its successors and assigns, and any parties in contract herewith from any and all damages, expenses, losses, costs

including, but not limited to, attorney's fees) which the above named parties may suffer as a result of any lien or attachment being imposed as a result of the performance of this Contract.

This provision shall not be construed as a waiver of liability of the Contractor and/or its surety under any provision of this Contract.

6. TEXACO'S OBLIGATIONS IN PERFORMING UNDER THIS AGREEMENT

A. Cooperation. Texaco agrees to cooperate with Contractor and to do all things necessary, within Texaco's ability, to assist Contractor in the required contractual performance.

B. Designated Representative. Texaco has designated a representative in Paragraph 7.H. who shall be charged with the responsibility of receiving notices on behalf of Texaco and of acting for Texaco under this Agreement.

C. Texaco's Liability. Texaco expressly limits its liability to Contractor to the consideration set forth in Paragraph 2.

D. Material Equipment_, and Services to be Provided. Texaco shall notify Contractor of all materials, equipment and services that Texaco elects to provide on a job by job basis in conjunction with Contractor's work.

E. Acceptance of Work. Texaco shall give, unless otherwise provided, a written acceptance of term and fixed turnkey work performed hereunder upon completion of the work by Contractor. Texaco shall make an acceptance inspection upon completion of the work for Contractor's full performance and compliance with the Agreement documents,

including any drawings, specifications, and/or project conditions that may be furnished by Texaco. Said acceptance shall not be construed to be a release of ANY GUARANTEES or obligations of the Contractor or a waiver by Texaco of any of its right, under this Agreement.

7. ADDITIONAL PROVISIONS

A. Right to Audit.

(1) Contractor shall maintain during the course of the work, and retain for not less than two (2) years after the end of the calendar year of final completion thereof, complete and accurate records of all of Contractor's costs and documentation of items which are chargeable to Texaco under this Agreement; and Texaco shall have the right at any reasonable time during said period and during normal business hours to inspect and audit those records by authorized representatives of its own or any public accounting firm selected by it. The records to be thus maintained and retained by Contractor shall include (a) payroll records, including social security numbers and labor classifications, accounting for total time distribution of Contractor's employes working full or part time on the work, as well as cancelled payroll checks or signed receipts for payroll payments in cash; (b) invoices for purchases, receiving and issuing documents, and all other unit inventory records for Texaco's stocks or capital items; (c) paid invoices and cancelled checks for materials purchased and for subcontractor's and any other third parties' charges; and (d) all other records required to verify the accuracy of Contractor's charges. If such audit should reveal a discrepancy between the amount or

value of materials and/or services billed to Texaco and that which is evidenced by Contractor's books and records, Texaco shall have the right to adjust its account with Contractor, which adjustment may necessitate a refund of funds disbursed to Contractor. If Contractor fails to maintain or make available such books and records as provided herein, Texaco will not be liable for any charges based on such costs unless Contractor produces adequate proof thereof.

(2) No director, employe or agent of Contractor or of any subcontractor of Contractor shall give to, or receive from, any director, employe or agent of Texaco, directly or indirectly, any payment, loan, service, elaborate entertainment or travel, or gifts of other than nominal value, in connection with the work or, without Texaco's prior written agreement, enter into any business arrangement, directly or indirectly,, with any director, employe or agent of Texaco that might adversely affect Texaco or the director's, employe's or agent's judgment on behalf of Texaco. Without limiting any general audit rights above, Texaco may audit pertinent records of Contractor and any subcontractor or vendor in connection with the work to be performed hereunder and all transactions related thereto for the sole purchase of determining whether there has been compliance with this paragraph (2). Texaco's right to audit under this paragraph shall be for a period of not less than two (2) years after the end of the calendar year of final completion of the work performed pursuant to this Agreement. If Texaco is unable to gain access to the pertinent records of any of Contractor's subcontractors, or vendors, Contractor will expand all reasonable efforts

to assist Texaco in obtaining the information from its subcontractors and vendors necessary to complete an audit.

B. Extra Work. Texaco shall have the right to order extra work or make changes by altering, adding to, or deducting from the original scope of work agreed, but no extra work or change shall be undertaken by Contractor unless a written order has been obtained from Texaco or a separate estimate in writing shall have been submitted to Texaco by Contractor and agreed to in writing by an authorized representative of Contractor and Texaco. Said order or estimate shall state the extension of time, if any, allowed and specifically provide for payment and the terms of payment for said extra work, which shall be either:

(1) A fixed turnkey sum agreed upon in writing before the work is performed, or if it is impossible to agree on a fixed turnkey sum, then,

(2) In accordance with the rates contained in Contractor's Rental Rate Schedule made a part of this Agreement as Exhibit "A". A daily statement of extra work shall be delivered to Texaco in accordance with the provisions of Article 1.A. of this Agreement.

C. Conflicts. In the event that there is a conflict between the provisions of this Agreement and the provisions of any other writing, then the terms of this Agreement shall control.

D. Assignability. The rights and obligations contained in this Agreement shall not be assigned by either party without the express written consent of the non-assigning party being first obtained except that Texaco may assign this Agreement to any of its subsidiary companies without first obtaining that consent.

E. No Oral Modification. No modification of this Agreement and no authorization for extra or additional work or for eliminations or changes in specifications shall be binding on Texaco unless it is in writing and signed by the duly authorized representative of Texaco.

F. Optional Termination. Texaco at its absolute discretion, may, by written notice to Contractor terminate and abandon the construction of facilities or suspend work in progress. Upon such discontinuance or suspension, Contractor shall be entitled to receive and or retain all its reimbursable costs as reasonably needed to terminate the work hereunder and turn it over to Texaco. Contractor shall retain or be paid by Texaco that portion of the fixed fee, if applicable, which is reasonable and proportional to the work performed by Contractor prior to the termination of work.

G. Safety. Contractor shall take all measures and precautions necessary or proper to provide safe working conditions and to prevent any accident in connection with the performance of work hereunder. Contractor shall have the sole responsibility for the safety of its enployes and subcontractors, as well as their performance in accordance with the appropriate safety practices.

Contractor shall conduct the work in a safe and practical manner and in accordance with all applicable governmental laws, orders and regulations, including but not limited to those contained in the Code of Federal Regulations (specifically 30 C.F.R §142 - Workplace Safety and Health), as well as those of the United States Coast Guard, the Minerals Management Service, the Occupational Safety and Health Act of 1970, and any amendments thereto, as well as the guidelines, recommended practices or standards published by and customarily adopted by the industry, including but not limited to the American Petroleum Institute and the Independent Association of Drilling Contractors.

H. Notices and Payments. Any general notices required to be made under the terms of this Agreement shall be deemed to have been made if mailed by Certified Mail, return receipt requested, as follows:

To Texaco:
Texaco Inc.
Post Office Box 60252
New Orleans, LA 70160
Ann: Contract Administration Group

To Contractor:
Danos & Curole Marine Contractors, Inc.
Post Office Box 217
Larose, LA 70373
(504) 693-3313

Any specific notices and payments required to be made under the terms of this Agreement should be made as specified above to the Texaco office directing the work as follows:

Harvey Office:
Texaco Inc.
1036 Destrehan Avenue
Harvey, LA 70058
Attn: Mr. K. B. Wisdom,
District Manager

Morgan City Office:
Texaco Inc.
1201 Brasher Avenue
Morgan City, LA 70380
Attn: Mr. C. D. Journey,
District Manager

New Iberia Office:
Texaco Inc.
1329 Jane Street
New Iberia, LA 70561-0457
Attn: Mr. R. K. Thomas,

District Manager

IN WITNESS WHEREOF, the parties have set their hands and seals the day and date first above written.

EXHIBIT "C"
CONTRACT SUPPLEMENT

This attachment is incorporated in and made a part of Contract, dated March 23, 1987, between Texaco Inc., hereinafter called "Company" and Danos & Curole Marina Contractors, Inc., hereinafter called "Contractor."

EQUAL EMPLOYMENT OPPORTUNITY

During the performance of the contract described above, Contractor agrees to the following additional terms and conditions to the extent they may be applicable to the work to be performed under such contract in accordance with the provisions of the following described Executive Orders, Acts, and implementing rules and regulations issued thereunder.

A. E.O. 11246, as amended by E.O. 11375 (Race, Color, Religion, Sex and National Origin)

1. If the contract is in excess of $10,000, the Contractor agrees to comply with the provisions of Section 202 of such Order (the "Equal Opportunity Clause"), which clause is incorporated herein by reference pursuant to the regulations promulgated under such Order (41 C.F.R. Sec. 60-1.4(d).

2. If the contract is in excess of $10,000! the

Contractor certifies that it does not maintain or provide, nor will it maintain or provide for its employes any segregated facilities at any of its establishments, and that it does not permit nor will it permit its employes to perform their services at any location, under its control, where segregated facilities are maintained.* Contractor agrees that a breach of this certification is a violation of the Equal Opportunity Clause of Executive Order 11246. Contractor further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontractors exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity Clause; that it will retain such certification in its files; and that it will forward the prescribed notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods.**

3. If the contract is in excess of $30,000 and the Contractor has more than 50 employes, the Contractor agrees (a) to file annually, on or before March 31 of each year, (or within 30 days after the award of such contract if act filed within 12 months preceding the date of the award), complete and accurate reports on Standard Form 100 (EE0-1) with the appropriate governmental agency, in accordance with the regulations issued by the Secretary of Labor (41 C.F.R. Sec. 60-1.7), and (b) to develop a written affirmative action compliance program for each of its establishments in accordance with the regulations issued by the Secretary of Labor (41 C.F.R. Sec. 60-1.40).

B. E.O. 11701 (Section 402 - Veterans Readjustment Act of

1974)

If the contract is in excess of $10,000, the Contractor agrees to comply with the affirmative action clause and regulations promulgated under such Order (41 C.F.R. Part 60-250) which clause is incorporated herein by reference pursuant to Section 60-230.22 of such regulations.

C. E.O. 11758 (Section 503 - Rehabilitation Act of 1973)

If the contract is in excess of $2,500, the Contractor agrees to comply with the affirmative action clause and the regulations promulgated under such Order (41 C.F.R. Part 60-741), which clause is incorporated herein by reference pursuant to Section 60-741.22 of such regulations.

D. E.O. 11625 (Minority Business Enterprises)

1. If the contract is in excess of $10,000, the Contractor agrees to use its best efforts to provide minority business enterprises with the maximum practicable opportunity to participate in the performance of such contract to the fullest extent consistent with the efficient performance thereof (41 C.F.R. Sec. 1-1.1310-2(a)).

2. If the contract is in excess of $500,000, the Contractor agrees to comply with the Minority Business Enterprises Subcontracting Program clause promulgated under such Order (41 C.F.R. Sec. 1-1,1310-2(b)), which clause is incorporated herein by reference.

E. Section 905 (Railroad Revitalization and Regulatory Reform Act of 1976)

1. The Contractor agrees to comply with the requirements of Title 49 C.F.R. 265 Subpart B of

the regulations promulgated under such Act regarding "Nondiscrimination in Federally assisted Railroad Programs" and the nondiscrimination clauses therein are incorporated herein by reference.

2. If the contract is for $30,000 or more, the Contractor agrees to comply with and implement the Affirmative Action Program established pursuant to Section 265.11 of 49 C.F.R.

F. Public Law 95-507, Section 211, 15 U.S.C. Section 637 (Small Businesses and Small Socially and Economically Disadvantaged Businesses)

1. If the contract is in excess of $10,000, the Contractor agrees to use its best efforts to provide small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals, as defined in 43 F.R. 35809, with the maximum practical opportunity to participate in the performance of such contract to the fullest extent consistent with the efficient performance thereof in accordance with the regulations promulgated by the Office of Federal Procurement Policy (OFPP), 43 F.R. 35809, dated May 25, 1980, which are incorporated herein by reference.

2. Negotiated Contracts. If the contract is in excess of $500,000, the Contractor agrees to comply with the small business and small disadvantaged business subcontracting plan as set forth in 45 F.R. 35810, dated May 28, 1980, which are incorporated herein by reference.

G. Executive Order 12138 (Women's Business Enterprises Program)

1. If the contract is in excess of $10,000, the Contractor agrees to use its best efforts to provide women owned businesses, as defined at 45 F.R. 358-15, with the maximum practical opportunity to participate in the performance of such contract to the fullest extent consistent with the efficient performance thereof, in accordance with the regulations of the Office of Federal Procurement Policy (OFPP) issued pursuant to this Order and appearing at 45 F.R. 35814, dated May 28, 1980, which are incorporated herein by reference.

2. Contracts over $500,000 or $1 Million for construction of any public facility. If the contract is in excess of $500,000 or $1 Million for construction of any public facility, the Contractor agrees to comply with the regulations promulgated by the Office of Federal Procurement Policy (OFPP) appearing at 45 F.R. 35815, dated May 28, 1980, which are incorporated herein by reference.

ACCEPTED THIS 27 DAY OF MARCH, 1987.

Footnotes

* As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation and housing facilities provided for employes which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color or national origin because of habit, local custom or otherwise.

** The form of the prescribed notice is as follows: NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATIONS OF NONSEGREGATED FACILITIES.

A Certificate of Nonsegregated Facilities as required by the May 9, 1967 order on Elimination of Segregated Facilities by the Secretary of Labor (32 Fed. Reg. 7439, May 19, 1967), must be submitted prior to the award of a subcontract exceeding $10,000 which is not exempt from the provisions of the Equal Opportunity Clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually or annually). Note: The penalty for making false statements in offers is prescribed in 1§ U.S.C. 1001.

EXHIBIT "D"
NONDISCRIMINATION IN OUTER CONTINENTAL SHELF CONTRACTING
30 CFR 270

This Exhibit is incorporated in and made a part of Agreement No. NO-67-53 dated March 23, 1987, between Texaco Inc. and Danos & Curole Marine Contractors, Inc., hereinafter called "Contractor."

During the performance of the contract described above, Contractor agrees to the following additional terms and conditions to the extent they may be applicable to the work to be performed under such contract in accordance with the provisions of the following described Title 30 of the Code of Federal Regulations, Part 270.

If the contract is in excess of $10,000 the Contractor agrees to comply with the requirements of Title 30 C.F.R. 270 regarding "Nondiscrimination in Outer Continental Shelf Contracting," effective June 21, 1985, and the non-discrimination clauses* therein are incorporated herein by reference.

ACCEPTED THIS 27DAY OF MARCH, 1987.

Footnotes

*This Part provides that "(N)o contract or subcontract to which this part applies shall be denied to or withheld from any person on the grounds of race, creed, color, national origin, or sex."

EXHIBIT "E"
CERTIFICATE AND UNDERTAKING OF COMPLIANCE WITH ENVIRONMENTAL LAWS

The undersigned ("Contractor") hereby agrees and certifies that:

1. No facility to be utilized by Contractor in the performance of this Agreement is listed on the United States Environmental Protection Agency List of Violating Facilities. See Executive Order No. 11738 of September 12, 1973 and 40 C.F.R. 15.20.

2. Prompt written notification shall be given by Contractor to Texaco Inc. of any communication indicating that any facility is under consideration to be included on such list.

3. All requirements of Section 114 of the Clean Air Act (42 U.S.C. 1857) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251), relating to inspection, monitoring, entry, reports, and information as well as all other requirements specified in said Sections, and all regulations and guidelines issued thereunder, shall be complied with.

4. The criteria and requirements listed above will be included in all contractor's subcontracts, and Contractor will take such action as the Government may direct as a means of enforcing such provisions. Contractor agrees

to be responsible for ensuring that its subcontractors comply with this provision.

Appendix

Appendix A
Order and Reasons entered on June 5, 2001, by Honorable Sarah S. Vance, United States District Judge

Appendix B
Judgment dated June 14, 2001, from the United States District Court, Eastern District of Louisiana

Appendix C
Decision dated May 15, 2002, from the United States Court of Appeals for the Fifth Circuit

Appendix D
Texaco, Inc.'s Master Work Agreement with Independent
Contractor

Appendix E
Scott Nimelstein Deposition excerpts

Appendix F
Tommy L. Mathews, Jr. Deposition excerpts

Appendix 0
Ronald Ratcliff Deposition excerpts

Appendix F
Daryl Langlois Deposition excerpts

CIVIL ACTION NO. 99-1456
SECTION "R"
MAGISTRATE (4)

The deposition of DARYL LANGLOIS was taken in the above-entitled cause, pursuant to the following stipulation, before Linda Brewer, Certified Court Reporter, in the offices of Danos & Curole, 1602 Pinhook, Suite 301, Lafayette, Louisiana, on the 14th day of August, 2000, beginning at 2;25 p.m.

A. Yes.

Q. And it was at that time that he requested you to try and get him off of that rig?

A. He stated that he would like to have beer taken off of the rig, yes.

Q. And isn't it a fact that after that conversation, you made some calls to try and get him taken off of the rig?

A Normally we call Texaco to see where the evacuation stands.

Q. Is it not a fact that you made a number of calls to the Texaco dispatcher and were unable to reach him?

A. Something to that effect, yes. I mean, we could not contact anybody because they were in evacuation.

Q. Who was in evacuation?

A. Well, I'd imagine they were evacuating and they were on the phones, just as we were.

Q Did you attempt to reach the dispatcher on a number

of occasions?

A Yes, I did.

Q And why couldn't you reach him?

A I just - - I don't recall that far back. You know, I don't know, to be honest with

Q Your employees?

A Yeah.

Q So you assumed that Phillip Allen was going to come in with the evacuation of the other platforms?

A I assumed he was.

Q Was that the responsibility of Danos & Curole, or was that the responsibility of Texaco?

MR. DABOVAL: Let me object. Lack of foundation. He doesn't know what the contractual responsibilities are.

MR. WIEDEMANN: I didn't ask him about contractual responsibilities.

MR. DABOVAL: Sure you did. You asked him what their responsibilities were. It had to come from somewhere.

MR. WIEDEMANN: (CONTINUING)

Q Can you answer the question?

A Repeat it.

Q Was it the responsibility of Danos & Curole or Texaco to evacuate people from Texaco platforms?

A We had no - — we do not supply transportation to get the people in.

heard it, if anybody ever said it, if you saw anything in writing. And my question is: To your knowledge, did anybody in your company ever do that?

A Not to my knowledge. And I don't see how I would even have that knowledge. That's my point, I guess.

Q Well, whose knowledge would that be?

A Whoever would do it. I mean, whoever would enter into that. You're asking me if I know. I don't know.

Q Aren't you a personnel supervisor?

A Yes, I am - - or was.

Q You were in charge of personnel and when they went and when they came back?

A Yes, sir.

Q You were in charge of assigning personnel to rigs?

A Yes.

Q And it's your testimony that you don't know anything about any agreement that would permit Texaco to do that insofar as your personal knowledge?

A No.

Q Do you know of any employee, and more particularly Phillip Allen, that ever signed any written document or granted any verbal authority that they could be - - or he could be designated to stay on a platform during a hurricane or a storm?

A No.

Q You recognized from your discussion with Mr. Allen

that it was, in fact, a hazardous circumstance to be working on the Plus-10 deck?

A If the waves were going over the Plus-10 deck?

Q Yes. How far is the Plus-10 deck above the surface of the sea; do you know?

A Never been out there.

Q But if the waves were going over the Plus-10 deck, you recognized that that would be a hazardous circumstance for your employee to work under?

A. Yes.

Q Did Danos & Curole have any supervisor out there to tell Mr. Allen what he should or should not do vis-à-vis the work on the rig?

A Not out there, no.

Sigur, the Texaco supervisor?

MR. DABOVAL: Let me object. You don't know what Mr. Sigur was doing out there. You don't even know his position.

MR. WIEDEMANN: (CONTINUING)

Q You can answer the question.

A I would have expected Phillip to know, after having conversations with me, to stay inside.

Q That wasn't my question. My question was: Would you expect _ _ I'm not talking about the storm. I'm asking you a question. Would you expect Mr. Allen on a day-by-day and hourly basis to take directions and instructions from Mr. Sigur, the Texaco supervisor, as to what he was to do on a day-by-day basis.

MR. DABOVAL: Same objection.

A Yes.

MR. WIEDEMAMN: (CONTINUING)

Q There's nobody else out there to tell him what to do; is there?

A I'm not there.

Q I understand you're not there. But if Mr.

this? Is that something they do on a day-by-day basis?

A We tell our employees on a day-by-day basis to - - if anything endangers them, to call us. And that's when I got to the point, when I found out he was down there, to tell him that's not where you're supposed to be, that basically at that point it doesn't matter what a Texaco hand says, he's supposed to stay inside.

Q So Mr. Allen did call you and report that he was being exposed to a dangerous circumstance on the Texaco rig; did he not?

A Yes. We established that. You've asked me that.

Q And that's what he's supposed to do?

A What's that?

Q That's what Mr. Allen is supposed to do it he's told to do something that he considers dangerous by a Texaco supervisor, is to call you and tell you that it's dangerous?

MR. DABOVAL: Let me object.

A Yes.

A Not that I was aware of

Q Did he ever have any emotional or mental problems that you were aware of?

A Not that I'm aware of.

Q Was he considered a valued employee of Danos & Curole?

A He was probably better than average.

Q And am I correct that he has not worked for you all since the accident of September 9, 1998?

A I don't believe he has. I'm not 100 percent positive.

Q Do you know of any other reason why he has not returned to work other than the accident that he sustained?

A I believe he has cancer now.

Q Do you know when he was diagnosed with cancer?

A If I'm not mistaken, it wasn't that much longer after.

Q Do you know the reason that he did not return to work is because he was injured in this accident, his neck and his back and his stomach?

A I guess for that time being until it was

with Mr. Allen during this period of time?

A I don't know. It depends on where my statement started I guess. I guess whenever the tropical storm - - when the weather was getting bad. I don't know the exact time.

Q You mentioned on several instances - - and Mr. Wiedemann mentioned it - - the date of the tropical storm. And that confuses me a little bit because a tropical storm can exist over days, weeks, or whatever period of time. That's why I'm confused, and I don't want the record to be confused by the timing of all of this stuff. So that's why my question to you is: When did you first learn or hear from Mr. Allen that he was out on the platform with any kind of problems?

A On 9/9/98.

Q Okay. It's your testimony that you had a conversation with him on 9/9/98?

A Yes, I did.

Q Okay. And what was the subject of that conversation?

A I mean, just that the weather was bad and,

know what they needed to do to perform their work, right?

A Say it again. Repeat the question.

Q The customer's expectations can be that the Danos & Curole employee that you send out and assign to the job is experienced at whatever needs to be done?

A Yeah.

Q There is no agreement contractually, verbally, or otherwise where there is any expectation that Texaco employees will instruct or supervise how and the method and manner in which that Danos & Curole employee goes about his work, how to do his work, right?

A Not that I'm aware of.

Q On the accident investigation report, the reference to work that was being done, opening the valve with a wrench and he slipped and hit head, what was the source of that information?

A Phillip.

Q Did you ever talk to verify that he did, in fact, hit his head?

A The only other place I would have gotten

Q Now, an employee such as - - is this an uncommon situation, or does Danos & Curole assign a specific person to jobs from time to time?

A How do you mean?

Q Was Mr. Allen the only Danos & Curole employee on this job on 643?

A I don't recall right off hand if there were any other D&C people.

Q Is that uncommon that just a single employee will be sent out to a job?

A No.

Q We talked about supervisors and things like that. In a situation where there's a single Danos & Curole employee needed to accomplish the job, wouldn't that employee be considered his own supervisor?

A Unless there was like a field foreman.

Q Okay. I want to then explore that with you because I want to understand what the relationship is. Is it your expectation that when you contract with a customer and send personnel out there, that the customer has to provide the supervision and instruction to those employees?

employees? Are you saying they're supposed to instruct them?

A The Texaco hands normally do supervise us.

Q What do you mean by "supervise"? I said "instruct"; you say "supervise."

A I mean, they're over them. If there's a decision that needs to be made, if a Texaco hand says one way and a Danos & Curole hand says the other way, it's going to go with Texaco.

Q Is the - - is Texaco expected by Danos & Curole to instruct Danos & Curole employees on how particular tasks have to be done or should be done, methods?

A I wouldn't say on each individual task, no.

Q Is the role of the Texaco supervisor, field foreman, or whatever you want to call it, company man, typically to monitor the progress of the contractor's work and make sure that they're getting what they contracted for?

A Yes.

Q But not to tell them how to do their job?

A Not each individual task, no.

Q And you don't expect that Texaco will provide a foreman looking over the shoulder of the Danos & Curole employees to make sure that how they're doing the job is right?

A Not on each - - no, I don't think so.

Q And in this particular instance with Mr. Allen, it wasn't necessary for a Danos & Curole foreman or

supervisor to be there looking over his shoulder; is that right?

MR. WIEDEMANN; Object to the form of the question. There is no supervisor.

MR. DABOVAL: (CONTINUING)

Q And my question is: That wasn't necessary because Mr. Allen knew what he was supposed to be doing, the job he was performing was certainly within his experience and knowledge, right?

MR. WIEDEMANN: And I object to the form of the question. The fact that he had a Texaco supervisor, Mr. Jerome Sigur.

A Restate the question.

MR. DABOVAL: (CONTINUING)

Q My question is that what Mr. Allen's job was On this particular platform did not require a Danos & Curole supervisor to be out there looking over his shoulder - -

A No.

Q - - and telling him how to do his work?

A No.

Q Mr. Allen, based on his experience or in the judgment and assessment of whoever with Danos & Curole, was expected to know how to do the pumping work or whatever he was sent out there to do?

A Yes.

Q And that is what Danos & Curole guaranteed and warranted to its customer?

A Yes.

Q Now, what about the employee like Mr. Allen, what if in the course of their work - - and being a contractor Danos & Curole is normally working on a job for somebody, correct?

A Correct.

Q And typically whether that be on land or offshore or whatever, that's on someone else's structure, property, or whatever, right?

A Right.

Q. Okay. Now, what is a Danos & Curole employee - - whether he's a single one sent out to a job or a crew sent out to a job, if they encounter a situation in the work that they feel presents a danger or a risk of injury, what are they supposed to do?

MR. WIEDMANN: Object to the form of the question as calling for an opinion. He was only on the job for a month at the time.

MR. DABOVAL: (CONTINUING)

Q Can you answer that question?

A Tell them to call the office.

Q Okay. Are they expected - - is anyone from Danos & Curole, either back then or since or whatever, ever instructed their employees to - - if the customer says to do it, don't ask questions, do it, I don't care how dangerous it is, we don't want to hear from you?

A No.

Q If they encounter in their judgment or opinion something that they believe might be unsafe, they are not to do it, right?

A Right.

Q And to contact someone from Danos & Curole?

A Yes.

Q And who would be the person to contact?

A If it was during hours, they would probably refer them to their - - at that time the personnel coordinators. Okay. Now, when you spoke with Mr. Allen on the 9th, you said - - that was the first time?

A Yes.

Q Did he at all express to you that he was forced to do something that he felt was unsafe by Mr. Sigur or anyone from Texaco?

MR. WIEDEMANN: I object to that as repetitious. It's been asked and answered previously.

A Do I feel he was forced?

MR. DABOVAL: (CONTINUING)

Q. No, no, no. Listen to my question. Did he tell you that he had been forced to do something that he felt was unsafe by Mr. Sigur or anyone from Texaco?

how anybody might have been taken off before you spoke to him the first tine?

A Not that I'm aware of.

Q Your reference in the accident investigation report to flying or flighting, that was just based on what Mr. Allen had said?

A Yes.

Q Do you all give your employees any kind of training in safety and the do's and don'ts?

A Yes.

Q Are your employees instructed not to that the expectation is that they're to be responsible for their own safety, also?

A Yes.

Q Okay. And if they encounter a situation that they feel is dangerous in their judgment and opinion,, to contact the company?

A Yes.

Q Have you ever had any problems with Texaco as far as anyone from Texaco forcing Danos & Curole employees to do things that that employee felt was unsafe?

and he still hadn't asked to come in because of any injury or anything, right?

A No, he didn't.

Q In the subsequent conversations or even in the initial conversation, did he tell you why he was outside and what he was doing in those conversations over the phone?

A When he said that he had gotten hit by a wave?

Q Right. Or at any time.

A Yes.

Q Okay. What did he tell you he was doing?

A Something to the effect of trying to keep the platform on line.

Q But you don't know what particularly he was doing?

A No, not exactly.

Q Did he stay in for the remainder of the time like you had suggested to him or even instructed him?

A I'm not sure if he did.

Q When you called back and checked in, did you always speak to him or did you ever speak to the other fellow out there?

A I don't recall ever speaking to the other fellow. I think it was always to him.

Q Not even the other guy answering?

A He may have answered once or twice. I'm not sure.

Q Was there ever a situation when you checked in with him later and periodically that he expressed to you that things were really dangerous out there and some things had to be done in an emergency fashion?

A He just expressed that he was scared. That's about it.

Q But nothing was expressed to you that you took any more steps to try and contact the people at Texaco other than to call the dispatcher?

A Not that - - not that I recall, no.

Q If he expressed something to you that it was a real dangerous situation, that the security and stability of the platform and the structure, you would have, I assume, taken other steps to try and get help; is that right?

MR. WIEDEMANN: I object to the form of the question. The witness has already testified that it was a

A Yes.

Q And that first conversation that you had with Phillip Allen was one in which he was expressing concern as to why he had not been evacuated from 643; isn't that so?

A Yes.

Q He called you first to - - in essence, to express his concern and fear that he had not been evacuated?

MR. DABOVAL: Let me object to the form. Concern and fear, what does that mean?

MR. WIEDEMANN: (CONTINUING)

Q Is that not accurate?

A Could you repeat the question again?

Q Is it not accurate that the first conversation that you had with Mr. Allen was his expression of fear and concern that he had not been evacuated in the face of the Storm Francis?

A Yes.

Q And as a matter of fact, that's exactly what he told you again when he came in on the 14th and you recorded in your accident report. "At the time of the accident, he was on the platform during Tropical Storm Francis. Texaco had started flighting hands in, but left Phillip and Jerry, their own supervisor, on the platform." That's exactly what he told you; isn't that so?

A That's what he stated.

Q And that's the same thing he told you in your

telephone conversation on the 9th?

A That's what he stated.

Q And is it not a fact that in another conversation after that first conversation he told you that he had almost been washed overboard by a wave; is that correct?

A That's what he stated.

Q And it's your understanding that it was this occasion when he indicated to you at a later time that he had been injured?

A When he came in, that's what he stated.

Q Now, is it - - am I correct - - and I believe I had asked you earlier - - Mr. Allen wrote in his handwritten note that he had called on Friday and told you that he had pulled a stomach muscle. Do you recall that in a telephone conversation?

foot or hit his nose, you would have put that down?

A That's what I would have put down.

Q You would record exactly what he told you and exactly what the cause of that was, as he told you?

A As he told me.

Q Now, it's your policy, as I understand it, to circulate this accident report to the customer, I presume so that the customer will know that an accident happened and they can have that information for their own records; is that right?

A Normally we'll do that if they request it. Q And you would ordinarily also follow up the circulation of the accident report with a conversation with somebody with the company?

A We'd fill out the accident report and then send it to the safety department at that time.

Q The safety department of Texaco?

A Of Danos & Curole.

Q And it is then the policy of the company to send that to the customer?

follow the requests of the supervisors like Mr. Sigur as to what they should do or not do?

A Within a reasonable scope.

Q So you're not expected, if Mr. Sigur or any other supervisor for Texaco or any other company tells your employee, I want you to work on the sump pump, I want you to work on an engine, I want you to work on whatever, to follow that request?

A A reasonable work assignment, yes.

Q Well, working on a sump pump, working on an engine, working on whatever the supervisor decides he wants you to work on is a reasonable assignment; isn't it?

A Yes. If that's what the employee is trained to do, yes.

Q You wouldn't expect the employee if Mr. Sigur says to work on the sump pump, to say no, I'm not going to work on that, I'm going to work on something else; would you?

A It depends. Like if you're speaking about an operator that has that training, yes.

Q So you would expect the employee, assuming

testify to the truth?

MR. DABOVAL: No.

MR. WIEDEMANN: Well, your objection is to the form of –

MR. DABOVAL: But you're not going to make statements on the record that are not true, Larry.

MR. WIEDEMANN: You can read the question back, please.

(COURT REPORTER READ BACK AS REQUESTED)

A He reported that after the fact, and I told him after he had already done that not to do anything further.

MR. WIEDEMANN: (CONTINUING)

Q When he reported to you that he was down on the lower deck and was almost washed overboard, you told him to go inside and not do any further work; is that correct?

A Yes. He was already back inside when he called and told me.

Q And you told him not to go outside further?

A Yes.

Q But before that had occurred, he had expressed his fear and concern about his

second time you spoke to him was when he said he was almost washed overboard by a wave. Is that not correct?

A No. The initial conversation is When I found out he was almost washed over by a wave.

Q So now your testimony is that the second conversation was when he expressed fear over why he was not evacuated?

A I believe that was it all along.

Q It was at that time that you told him you were going to attempt to do something to get him evacuated?

A Yes, I was going to try.

Q And to do something to get him evacuated, whether it was before this incident or after this incident, required you to get the intercession of Texaco; is that not so?

MR. DABOVAL: Let me object.

A My idea about telling him that I was going to try, but I knew I'm not in charge of the flights. I can't do anything about them.

MR. WIEDEMANN: (CONTINUING)

A Did anybody - - I'm sorry.

Q Did anybody ever explain to you why Texaco waited –

A No.

Q - - until it was too late to evacuate Mr. Allen and Mr. Sigur?

A No.

Q Was it the job of Danos & Curole to determine when to evacuate Mr. Allen and Mr. Sigur?

MR. DABOVAL: Asked and answered.

A No.

MR. WIEDEMANN: (CONTINUING)

Q Do you understand that the Texaco supervisor has an obligation not to assign your people to do something dangerous?

MR. DABOVAL: Let me object. You haven't established any supervisor over Mr. Allen.

MR. WIEDEMANN: Except Mr. Sigur.

MR. DABOVAL: No, including Mr. Sigur. That's your characterization of him being Mr. Allen's supervisor.

MR. WIEDEMANN: (CONTINUING)

Q What did you understand Mr. Sigur's position was on

643?

A A Texaco operator

Q And he would be a supervisor of your employees out there insofar as telling them what jobs he wanted done?

A I think earlier I explained if there was a decision that needed to be made and the Texaco operator had his opinion and mine had his opinion, normally the Texaco hands are going to go with his opinion. Not necessarily to say our guy is wrong or –

Q So would he not be a supervisor of your people insofar as making a decision of what has to be done over what your people want to do?

MR. DABOVAL: Object to the form of the question.

A I don't think - - he may not have been a direct supervisor. I don't know what level operators - - I know what level Phillip was. I don't know what level the Texaco guy was. I don't know if it was two exact hands that both got stuck out there at the same time or stayed out there at the same time or worked at the location

CIVIL ACTION NO. 99-1456
SECTION "R"
MAGISTRATE (4)

The deposition of RONALD RATCLIFF, JR., was. taken in the above-entitled cause, pursuant to the following stipulation, before Linda Brewer, Certified Court Reporter, in the offices of Danos & Curole, 1602 Pinhook, Suite 301, Lafayette, Louisiana, on the 14th day of August, 2000, beginning at 11:00 a.m.

in 1998?

A Garrell Rowell.

Q Can you spell that?

A G-a-r-r-e-l-l R-o-w-e-l-l.

Q Did you, prior to September 14th, 1998, have any direct dealings with the plaintiff in this case, Philip Allen?

A Sure.

Q In what way?

A Business relationship, friend relationship. We worked for the same company. We communicated often. He would stop in on his days that he came in and visit with us two to three hours at a time. We lived in the same town. We were raised with each other. We knew each other.

Q And you would be the one that would assign him to jobs?

A He was already assigned to Texaco when we came aboard. But, yeah, if Texaco would release him, we would find him somewhere else to go.

Q When you came to work for Danos & Curole in May of 1998, Phillip Allen was already

acknowledge that contractor is an independent contractor. At such, Texaco shall have no voice in the discharge, supervision, or control of contractor's employees, representatives, or subcontractors or in fixing their number, compensation, or hours of service. Texaco shall have no right to control the manner of contractor's performance but Texaco and its representatives shall have the right to inspect the work performed and make suggestions and comments thereon."

Q Is that consistent with your understanding of the relationship?

A Sure.

MR. DABOVAL: At what point in time?

MR. WIEDEMANN: In September of 1998.

A What you mean?

MR. WIEDEMANN: (CONTINUING)

Q Is there anything within what you just read that is inconsistent with your understanding of the relationship between Texaco and Dance & Curole referable to

our employees should get a raise. This says one thing, but some things happen differently. Just because they're under Texaco's supervision, they see their daily performance. That says that, but, you know, I can't give a, guy a raise unless Texaco approves .

Q So what you're saying is that at least your knowledge of what takes place is inconsistent with what Texaco describes in this contract?

A Not necessarily. You know, it's a big contract.

Q It says that Danos & Curole is an independent contractor. Do you understand that to be the case?

A Yes, we are.

Q And it says as such, Texaco will have no voice in the discharge. You say they have all voice in discharge?

A Yes. If they don't want somebody, then we replace them.

Q They tell you all to replace them?

A That's our business.

Q What would happen, if Texaco didn't like

what you're talking about, zone of danger.

MR. WIEDEMANN: (CONTINUING)

Q "Zone of danger" means an approaching weather system that may represent a hazard to personnel on a rig or a platform. You understand that?

A Yeah, I understand. I mean, what phase are we at? I mean, are we past the point where I've already made contact with them?

Q No.

A When it just touches the edge of the Gulf, or are we within a hundred miles of where it will probably strike?

Q We're at the point where you, as a personnel coordinator in 1998, would make a decision that something, whatever it is –

A You have bad weather?

Q – represents a hazard.

A I would first make contact with my customers and my employees, make sure -find out either they're in or out.

Q Who would make a decision as to whether they would come in or they'd stay out?

A Who would make that decision?

Q Yes.

A The customer would make that decision.

Q The customer in this instance would be Texaco?

A Yes, sir.

Q When you say you would contact your employees and your customers, what would you contact your employees for?

A Just find out if you do come in and you do hit the beach, make contact with me so that I can know your whereabouts because you're still on a scheduled job.

Q And how would you contact the employee?

A By phone.

Q You have a phone –

A By cell phones, personal phone. I have phone numbers of them home.

Q I'm talking about from your company in Morgan City to the rigs, what kind of contact would you have?

A What you mean, what kind of contact?

Q Well, you can't yell at them.

A By phone.

Q So you have to have some means of getting

A Ask to talk to them.

Q Which means you could talk to them directly?

A Yes, sir.

Q Did you have any other means of communication?

A No, sir.

Q You didn't have telefax or e-mail communication capabilities?

A Not at that time, I did not.

Q In 1998?

A In 1998, I did not.

Q So, as I understand it, Danos & Curole in September of 1998, did not have e-mail -A Danos & Curole might have. Ronnie Ratcliff did not.

Q Do you know whether Danos & Curole did? A I cannot not answer that because I don't know.

Q But you as personnel coordinator-A Did not have the e-mail address to West Cam 643-A, no, sir.

Q And you did not have telefax communication?

A I'm sure they did, yes, sir. I'm sure

Q My question was: You could suggest to Texaco that I think my employees ought to be evacuated with a storm approaching, but then the ultimate decision whether or not they would be evacuated would be Texaco's decision?

A Correct.

Q Have you ever suggested that an employee be evacuated when Texaco did not evacuate?

A No, sir.

Q Do you know - - did Danos. & Curole have any agreement with their employees such as Phillip Allen that they could be forced by Texaco to stay on a platform during, a storm?

A Do I have any knowledge of Texaco forcing an employee to stay?

Q No. Listen to my question, please. My question was: Did Danos & Curole have any agreement, verbal or otherwise, with an employee such as Phillip Allen that that employee could be forced to stay on a Texaco platform during a storm without his or her consent?

A I do not know.

forced to stay on a platform during a storm since everybody wants to get evacuated?

A I do not know.

Q Is it your testimony that Danos & Curole can subject one of its employees to the exposure of a hurricane or a storm by denying them the opportunity to be evacuated?

A No, sir, we do not deny anybody the opportunity to be evacuated.

Q Is it your testimony that Texaco in 1998 could force one of your employees to remain on a platform and deny him evacuation in the event of a storm approaching?

MR. DABOVAL: Let me object to the form of the question unless this witness has any personal knowledge from his position with Danos & Curole concerning any contractual or verbal agreements. By that, I don't think he's in a position to testify about what Texaco can or can't do.

A Correct.

MR. WIEDEMANN: (CONTINUING)

Q Do you know of any written contract between Danos & Curole and Texaco in existence in September of 1998 whereby Texaco with the authority of Danos & Curole could have forced one of your employees to remain on a rig during a storm that presented a hazard to his person?

A No, I do not.

Q Do you know of any verbal contract between Danos &

Curole in existence in September of 1998 that would permit that to occur?

A No, sir.

Q Do you know how and under what circumstances Phillip Allen was compelled to remain on Texaco 643 during the storm designated as Tropical Storm Francis in September of 1998?

A Do I know why he was kept?

Q Do you know under what circumstances he was kept on 643 during Tropical Storm Francis?

A It sounds like I'm answering -- making a decision of why he was kept out there. I

Q -- for Danos & Curole?

A Yes, sir.

Q Do you have any personal knowledge or familiarity with Mr. Allen's work on the 643 and how that was conducted in terms of how he knew what to do on any given day or during the day?

A Are you asking me do I think he done his job well?

Q No. I'm asking you: Are you aware with personal knowledge of how he went about doing his job?

A No, sir.

Q Now, Danos & Curole contracted with Texaco to provide personnel and equipment necessary to provide whatever services needed, right?

A Yes, sir.

Q And the personnel are to be experienced personnel in whatever that job is?

A Yes, sir.

Q And not someone that you necessarily -the customer needs to tell how to do the job that they're sent out to do?

A Correct. When a request would come in, we would fill it with the proper training requirements that were needed.

Q So in terms of – that's the business of Danos & Curole, to provide those services as experts?

A Yes, sir.

Q So if you send a worker out such as Mr. Allen or any other workers to a customer on a job that you contracted for, that customer is not expected to control the details of how he accomplishes his work or train him or anything of that sort, are they?

A I'm sure there's a briefing of the expectations, but –

Q The general scope of the job?

A Yeah, the employee knows what he needs to do.

Q It's not part of any agreement or expectation that the customer is to provide a foreman of sorts to specifically oversee the details of how he's doing his work and to supervise that and instruct him on how to do the work as opposed to the customer telling him what needs to be accomplished and monitoring the results?

A Correct.

Q Did you ever have the opportunity to look at Mr. Allen's personnel files to determine his employment history?

A No, sir.

Q Do you know whether or not Mr. Allen ever had missed any work or had any prior injuries?

A No, sir.

Q Who handles – as personnel coordinator, you wouldn't be responsible for maintaining the personnel files?

A If we sent him to training, we would put the training certificate in his file. But as far as his signing of all of his paperwork and coming to work for us, no.

Q What about if he had an illness or injury on the job, who would handle that within D&C?

A We would have initial contact of that.

Q "We" meaning the personnel coordinators?

A The personnel coordinators would know of it.

Q All right. Now, you had only been

CIVIL ACTION
NO. 99-1456
SECTION "R"
MAGISTRATE (4)

Deposition of SCOTT NIMELSTEIN, taken on April 12, 2001, in the offices of Texaco, Inc. 5th Floor, Texaco Center, 400 Poydras Street, New Orleans, Louisiana.

employees. They are not special contractors doing projects on their own.

Q. And one of the ways that they don't function as Texaco employees is they don't fall into the Texaco retirement program?

A. Yes.

Q. They don't fall into the Texaco medical coverage program?

A. No.

Q. They don't fall into the stock participation program?

A. No.

Q. The 401 K program; is that right?

A. Sure.

Q. So it doesn't cost Texaco as much money to employ a subcontractor like D & C?

A. I don't know. That might be true. What I do know is

I think we would pay a certain amount of money above and beyond what we would pay our own people that pays the employer for them to be able to fund their benefits but I don't know the exact numbers.

Q. And do you have the right – Do you issue any payroll checks to D & C – I mean to the employees like Mr. Allen?

A. No.

Q. Did you take any withholding taxes out for Mr. Allen, Social Security, income tax?

A. No.

Q. They are not on your payroll at all?

A. No. I'm only talking about effectively what's going on in the field.

Q. But they are not in any way listed insofar as federal taxation, state taxation, Social Security, as Texaco employees?

A. No.

Q. And they are not listed as Texaco employees insofar as any Texaco benefits?

A. No.

Q. And am I correct that it's only their employer that can fire them?

A. No, that's not true. We —— I mean as far as our facility goes we can get rid of them if they are not following safety procedures or whatever. We can dismiss them immediately.

Q. And how do you go about dismissing them?

A. We just tell them to go back.

Q. And how do you determine that you are going

CIVIL ACTION
NO. 99—1456
SECTION "R"
MAGISTRATE (4)
MAGISTRATE (3)

Deposition of TOMMY L. MATTHEWS, JR., taken on Thursday, April 19, 2001, in the offices of Texaco, Inc., 400 Poydras Street, 5th Floor, New Orleans, Louisiana.

Q. Okay. So, apparently somebody put Phillip Allen's name on the list of nonessential personnel to be evacuated; is that correct?

A. It looks that way.

Q. And then somebody scratched that off?

A. Correct.

Q. So, apparently the information that Ms. Little got initially -

A. Price.

Q. Price, I'm sorry. The information that Ms. Price got from the field initially was -

A. – incorrect.

Q. – that Phillip Allen was not an essential person?

A. Correct.

Q. That wouldn't have been something that she would have decided, that would have been something somebody out in the field decided?

A. Correct.

Q. Do you know who would have decided that insofar as 643 was concerned?

A. It could have been the pumper that brought it to light.

Q. But I mean who would have told her initially that Phillip Allen is nonessential?

A. Whoever made the flight manifest out and provided it to her.

Q. In other words, the people in the field would prepare the manifest?

A. Correct.

Q. But you don't know who prepared this manifest?

A. No, sir, I don't.

Q. Well, who would be the kind of people that would prepare this?

A. The production foreman that's out there, there would be a production foreman that would be assisting it, and most of the time it's put together by the CCPO, which is the clerk.

Q. CCPO stands for what?

A. Central control platform operator.

Q. Okay. And who would that be?

A. I don't know who they were at the time.

Q. Okay. But the people who would give that information

to the CCPO would be who?

A. The POP, all the other platforms.

Q. Okay. so, the CCPO would have gotten this information from the platforms -

A. Correct.

Q. – and then either he or somebody like

A. It's every tine a storm occurs.

Q. So, that decision is made when the evacuation process begins?

A. That's correct.

Q. And how does Texaco get the authority to designate a subcontractor's employee as an essential personnel to stay out in the storm?

A. Well, nobody stays out in the storm.

Q. Well -

A. If you have a full evacuation, nobody stays out in the storm. We go in and get them out.

Q. Well, in an evacuation, how does Texaco, if you know, go about getting the authority to designate a subcontractor's employee as an essential person?

A. It's the determination – the best I can recollect it to you is if the determination of that particular individual is incremental to the operation of that particular platform. So, if that person would leave that platform, that platform wouldn't be able to properly run or you couldn't bring it back up on line. So, you know, nonessentials can be declared to Texaco personnel also. It all encompasses the people who are out there.

Q. But the fact of the matter is – what you're saying is that a subcontractor employee, without the permission of his employer or without the permission of the employee, can be designated by Texaco as an essential employee and left out on the platform, during the storm.

MR. DABOVAL: Let me object to the use of the word "Left out".

THE WITNESS: Right. This is not a determination of leaving someone out there during a storm. This is a determination of if the storm comes or if there's a storm somewhere in the area, that person is essential to the operation and the safe evacuation of all the people involved. So, that's your determination, if he's removed from that facility, he puts that facility at risk.

BY MR. WIEDEMANN:

Q. Let me just state to you that Mr. Sigur, who is an employee at Texaco -

A. Correct.

Q. – wrote a statement, which I don't have

haven't determined when it was declared to be a Level-3?

A. From past experience?

Q. No, just from - -

A. Other hurricane evacuations?

Q. No. You went back to, I assume, your rig, 189, your platform- -

A. Correct.

Q. - - after this storm had passed and you had access to documents, I'm sure, and people. Did you learn that, when going back, when this was declared a Level-3 that everybody was evacuated?

A. No, sir, I didn't.

Q. At some point in time, was everybody evacuated from Garden Banks-189?

A. Correct.

Q. And that is a platform which is west and south of the platform that Mr. Sigur and Mr. Allen were on?

A. I believe so, yes, sir.

Q. Did you learn why, if Garden Banks-189 was evacuated, why the platform that Mr. Allen and Mr. Sigur were on, which I believe is 643-A, why they were not evacuated?

A. From what I gathered., they made the determination to suspend flight operations.

Q. In other words -

A. They were scheduled to cone in and flight operations Were suspended.

Q. Between the time that this was declared to be a Level-3 evacuation and the ability to evacuate Sigur and Allen, the weather conditions had gotten such that the helicopters couldn't operate?

A. I can't say that for sure.

MR. DABOVAL: Object to the form.

BY MR. WIEDEMANN:

Q. Well, you indicated that a moment ago and that's what I understood you to say.

A. Indicated that in what context?

MR. DABOVAL: Let me object. That's not a question, that's a statement.

BY MR. WIEDMANN:

Q. Well, I thought you said a moment ago that they had suspended flight operations.

A. That's correct.

Q. So –

A. But that was not in reference to any weather conditions that I know of.

Q. well, why did they suspend flight operations?

A. You would have to ask the pilots involved in this. It's their call, they fly to a certain point and then they use

their information to suspend flight ops.

Q. So, Air Logistics suspended flight operations; is that your understanding?

A. That's my recollection, yes, sir.

Q. And who made that decision?

A. To suspend flight operations?

Q. Yes.

A. The pilots. I don't know who the pilots are. There's too many aircraft involved in the operations.

Q. Well, do you understand that this was an individual pilot decision or a decision by Air Logistics or do you know?

A. I don't know. I would have to assume that it would be an overall decision by Air Log.

Q. Were there other people left out that they had scheduled to evacuate?

A. Not that I'm aware of.

Q. You mean the only two left in the western Gulf on platforms were Sigur and Allen?

A. Either that or there was a skeleton crew left on the rigs. I can't answer that.

Q. I know, but I'm talking about on your platforms.

A. The only two left, yes, sir.

Q. The only two left on the platforms in the western Gulf were Allen and Sigur?

A. Correct.

Q. How did you learn that information?

A. How did I learn that?

Q. Yes.

A. I don't recall.

Q. And do you know to whom the decision to cease flights would have been communicated to Texaco?

A. Probably Ms. Price.

Q. Ms. Price?

A. Yes, sir.

Q. And she would have notified her superiors?

A. Probably.

Q. But it's your understanding that that was a decision that was made by Air Logistics and